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Supreme Court, U.S.
FILED

No. 10A695 10 11 7 0 MAR 10 2011

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In The

Supreme Court of the United States

Christopher Earl Strunk,
John-Joseph Forjone,
H. William Van Allen,

Petitioners,

v.

Thomas J. Spargo et al.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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John-Joseph: Forjone in esse
H. William Van Allen in esse
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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Rule 14.1(a), this petition for a writ of certiorari to the Second Circuit in appeal case *Loeber et al. v. Thomas J. Spargo et al.* 08-4323-cv Mandate (see **App. 1**) of the August 27, 2010 Summary Order (see **App. 3**) that is sought to be reviewed by the Petitioners listed in the Caption is respectfully submitted on the following questions presented for review:

1. Did the courts below err in failing to order use of the New York State Constitution Article III as to Article 9 for redistricting in 2002 in portions found constitutional as to one-person-one-vote and non-discrimination as to the Voting Rights Act ?

2. Did the courts below err in not ordering a three judge panel as with 28 USC 2284 in regards to statewide redistricting and 42 USC 1973-C?

3. Did the courts below err when permitting use of the 1993 National Voter Registration Act (NVRA) and 2002 Help America to Vote Act (HAVA) to undermine express use of the Census enumeration for redistricting without the State Constitution?

4. Did the courts below err when ignoring the relationship of the nesting requirements of all districts drawn together required by the State Constitution?

5. Did the courts below err in use of one-person-one-vote as if eligible voter suffrage right is equated to those ineligible to vote?

6. Did the courts below err when *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (June 15, 1962) does not

preclude further use of the State Constitution when interpreted only in the express SCOTUS dicta?

7. Did the courts below err when *Wolpoff v. Cuomo*, Order, No. 14757-1992 (N.Y. Sup. Ct., Bronx County, May 14, 1992) (removed to federal court), 792 F. Supp. 964 (S.D.N.Y. 1992) (remanded to state court), Order, No. 14757-1922 (N.Y. Sup. Ct., Bronx County, June 12, 1992) does not preclude further use of the State Constitution when interpreted only in the express terms of SCOTUS dicta?

8. Did the courts below err when *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (2004), aff'd 543 U.S. 997 (2004) does not preclude further use of the State Constitution when interpreted only in the express terms of express SCOTUS dicta?

9. Did the courts below err when the Defendants ignore existence of the State Constitution and related express SCOTUS dicta?

10. Did the courts below err when ignoring existence of the State Constitution for districting?

11. Did the Court err below when ignoring the provision of census enumeration as applies to counting tourists or aliens that neither are citizens or permanent residents of a State or USA, in that the 14th amendment *Section. 1* includes only those persons born or naturalized in the United States, and subject to the jurisdiction thereof as a domiciliary matter, and further, in "*Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.*"

LIST OF ALL PARTIES

Pursuant to Rule 14.1(b), a list of Plaintiff parties to the proceeding *Loeber et al. v. Thomas J. Spargo et al.* 04-cv-1193 in the Northern District of New York taken on appeal to the Second Circuit in appeal case *Loeber et al. v. Thomas J. Spargo et al.* 08-4323-cv whose August 27, 2010 *Summary Order* (see App. 3) review is sought by the Petitioners listed in the Caption, and there is no corporate entity petitioner herein for this petition for a writ of certiorari:

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PETITION FOR WRIT OF CERTIORARI

Petitioners Christopher-Earl: Strunk in esse, John-Joseph: Forjone in esse, and H. William Van Allen in esse, each self-represented without an attorney, respectfully pray that a writ of certiorari issue to review the summary order below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit in appeal case *Loeber et al. v. Thomas J. Spargo et al.* 08-4323-cv August 27, 2010 Summary Order (see **App. 3**) with the October 13, 2010 Order denying rehearing (see **App. 12**) and November 5, 2010 Mandate (see **App. 1**) to the appeal taken from the Orders of U.S. District Judge Lawrence E. Kahn of the Northern District of New York of September 10, 2008 (see **App. 14**) denying the motion for reconsideration of the Order to dismiss of July 31, 2008 (see **App. 20**); and in addition: the July 2, 2008 interlocutory Decision and Order as to the magistrate decision of February 21, 2008 done pending a 28 USC §2284 three-judge panel decision (see **App. 30**); the January 8, 2008 Decision and Order dismissing the amended complaint as to The National Association of Secretaries of State (NASS), the application of the Help America to Vote Act of 2002 (HAVA) as to the Election Assistance Commission et al. (EAC) , requiring further service upon additional State

Defendants and denying a change of venue (see **App, 33**); the September 22, 2005 interlocutory order of Judge Kahn setting a deadline as to a 28 USC §2284 three judge panel brief (see **App. 63**); confusing October 4, 2005 order by Chief Judge Frederick J. Scullin (see **App. 54**) regarding the Strunk request for recusal of Judge Kahn associated and October 17, 2005 follow-up order by Chief Judge Frederick J. Scullin (see **App. 50**) following the August 15, 2005 order to remand by Second Circuit panel in the appeal case 04-5720-cv back to district (see **App. 66**) in the matter of appeal taken from the October 29, 2004 Decision and Order denying the Order to Show Cause application to restrain *the Organization for Security and Cooperation in Europe*'s (OSCE) election observers mission from interfering with the November 2, 2004 election (see **App. 73**) issued along with the sua sponte dismissal of the underlying complaint having been filed on or about October 25, 2004 when it was randomly assigned to U.S. District Judge Gary Sharpe but questionably reassigned to Plaintiffs' nemesis U.S. District Judge Lawrence E. Kahn by Order of Chief Judge Frederick J. Scullin (see **App. 79**).

JURISDICTION

The United States Court of Appeals for the Second Circuit decided Petitioners' case on October 13, 2010. Petitioners have timely filed this petition for certiorari with the Jan 3, 2011 Application to

extend the time to file a petition for a writ of certiorari from January 10, 2011 to March 14, 2011, was granted by Justice Ginsberg on January 11, 2011 extending the time to file until March 14, 2011. Petitioners jointly invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article 1 Section 2 Clause. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article 1 Section 2 Clause. 3.. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.

Fourteenth Amendment - Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Article 1 Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article 3 Section 2 Clause 2. In all Cases affecting those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article 4 Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article 4 Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall

protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

First Amendment – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ninth Amendment – The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment – The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES INVOLVED

The petitioners along without those similarly situated by a request with use of 42 USC §1973–C, 42 USC §1973-GG, 42 USC §15301 through §15545, 28 USC §2284, as applies among current congressional districts that are in New York State Law §111, current Assembly and Senate districts that are in State Law §§121 and 124, respectively.

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STATEMENT OF CASE

The issue here is, quite simply, the degree to which our New York state constitutional anti-gerrymandering provisions still have vitality in light of the evolving body of federal law that both demands proportional representation (see, e.g., *Mahan v Howell*, 410 US 315; *Reynolds v Sims*, 377 US 533) and prohibits state apportionment plans that dilute minority voting strength (42 USC § 1973[a][b]; see, *Thornburgh v Gingles*, 478 US 30) and use the decennial Census enumeration with the active voting rolls as a questionable cheat sheet without equal treatment of bottom-up home rule. And the active role of the Federal Courts bias to deny State citizens equal protection of the law and a republican form of government.

It is well documented that the New York State Legislature is dysfunctional to the benefit of many

outside interests including foreign investors and that that fact may be fairly connected directly to the failure to properly redistrict the Legislature under the State Constitution since 1962 with the overbroad use of *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (June 15, 1962) that injures Plaintiffs along those similarly situated with unlawful gerrymandering, under the rubric of one-person-one-vote without specificity.

That every ten years the creation of new political districts must start with the Assembly District (AD) as the most numerous branch of the legislature that as a fundamental building block relates to all other functions of representation, including the respective judicial district and county in which a supreme court justice is to be elected; and that according to the express terms of the State Constitution the AD(s) must form the respective state Senate district (SD) "wholly within". Further requires, when there are sufficient total persons shall be wholly within a respective county state sub-division that must be drawn simultaneously within the respective U.S. House member district (CD) when not elected at large, and despite the fact that the U.S. House size was questionably "capped" since 1929 and has remained part of a total 435 seats since 1912 notwithstanding the requirement of one house member per thirty-thousand persons has never

been amended [1]. Any attorney expecting to practice in either the state or federal courts on a regular basis to make a living are hesitant to present a true case and controversy involving reapportionment to challenge gerrymandering.

That unlike the Federal courts where a judge's term is for life when deserving removal are seldom removed as with Alcee Hastings then to go on to the U.S. House without a downside[2], State

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[1] Article 1 Section 2 Clause. 3.. ...The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.

[2] Representative Alcee Hastings was appointed to serve at the OSCE's Parliamentary Assembly along with Senator Hillary Clinton in regards to The Office for Democratic Institutions and Human Rights (ODIHR) that is the principal institution of the Organization for Security and Cooperation in Europe (OSCE) dealing with the "human dimension" of security. The office, originally named Office for Free Elections, was created in 1990 by the Charter of Paris and established in 1991. The name of the office was changed in 1992 to reflect the broadened mandate it received at the 1992 Helsinki Summit. The ODIHR, based in Warsaw (Poland) is active throughout the 56 participating States of the OSCE. It assists governments to live up to their commitments as participating States of the OSCE in the areas of elections, human rights, democracy, rule of law, and tolerance and non-discrimination. The ODIHR is best known for its role in observing elections. It has observed over 150 elections across the OSCE region and has deployed some 35,000 observers.

Justices are elected from ADs[3] that are required to be wholly within a County subdivision for the proper administration of justice, and that has been missing in various counties entirely as with Orleans County.

That the State Constitutional guarantee of effective subsidiarity[4] with bottom-up home rule by NYS Constitution Article 9 and NYS Municipal Home Rule Law requires unhindered provision of a *bottom-up* voluntary referendum that is absent at the *top-down* State Legislative level. Citizen Subsidiarity mandates that all redistricting be nested and follow mandates of State Constitution anti-gerrymandering provisions that otherwise bars a citizen a reasonable expectation of participating in and efficiently effecting

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[3] *NEW YORK STATE BOARD OF ELECTIONS ET AL. v LOPEZ TORRES ET AL.* CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT No. 06–766. Argued October 3, 2007—Decided January 16, 2008 and in which Strunk participated in support of the State Association of Justices and the law against a progressive power grab using the Federal courts.

[4] **Subsidiarity** is an organizing principle that matters ought to be handled by the smallest, lowest or least centralized competent authority. The Oxford English Dictionary defines subsidiarity as the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level. Subsidiarity is, ideally or in principle, one of the features of federalism, where it asserts the rights of the parts over the whole.

governance by consent that has since 1964 become an oligarchic tyranny. The courts erred in that the only reasonable reading of the state constitution as to each sub-division shall receive at least one assembly district "wholly within" that mandates the State legislature has a ministerial fiduciary duty to resize the respective state sub-division to such a specification, and that was not done; and therefore, is a substantive injury to deny fundamental due process.

REASONS FOR GRANTING THE WRIT

I. Overview

The State Constitution is a social compact that must be read as one inter-related document, not as if a Chinese menu; and especially so, in regard to the guarantee to each individual citizen or permanent resident alien domiciled within a respective town village and city wholly within a respective state county sub-division to support *one-person–one-vote.* That residents within a county sub-division having sufficient total inhabitants there have a reasonable expectation of dedicated representation for the respective residents of any State Senate and Assembly district nested "wholly within" such subdivision. That there is no discretion for the legislature when dedicated representation is absent in a county subdivision; and is a ministerial task every ten years to correct. The provision for bottom-up home rule and the rights of an individual resident

within such subdivision is a compelling state interest of the legislature and executive, and mandates strict express use of *one-person-one-vote*, *equal population* and *contiguous and compact districts* must be done. Increasing with impunity since 1992 legislative redistricting causes significant injury without regard to bottom-up home rule in villages, towns and or city within county sub-divisions for those deserving of dedicated representation with sufficient total inhabitants and those without sufficient size to the detriment of eligible voter liberty and rights within. Gerrymander issues require SCOTUS clarification:

- The SCOTUS never intended nor does it have authority to give suffrage to minors under 18 years of age, non-citizens, and or the civilly dead; however, the term "one-person-one-vote" applies only to those who are eligible to vote. Gerrymandering defeats the legitimate purpose of "*one-person-one-vote*" SCOTUS decisions. Districts in the 2002 redistricting are drawn with actual voters that exceed or diminish the mean total eligible voters to exceed the ten percent deminimus for disproportionate dilution of votes with a mis-definition of one-person-one-vote – see *Arbor Hill v. County of Albany County*, 289 F.Supp. 2d 269, 276 (N.D.N.Y. 2003). Therein Strunk was an intervener when at trial it was proven that those doing the Gerrymandering used tourists at will / undocumented aliens

undifferentiated in the 2000 Census count from either Citizens or permanent residents with a domicile as if tourists at will with allegiance to a foreign nation were part of a one-person-one-vote entitlement to suffrage to disproportionately disenfranchise and dilute the suffrage franchise of actual eligible voters in favor of majoritarian partisan politics – all occurring because there is no pre-clearance protection outside of the city of New York..

- Gerrymandering practice depends upon concentrating supporting votes to incumbents and dividing those of the opposition without authority to do so. There is no legitimate law that requires the Democrat or Republican Party to take preference over any association or person, when express use of the State Constitution and intent of use of the decennial census prohibits it.

- Redistricting requires use of Census Tracks ordered by Congress and guaranteed by the State Constitution; but, gerrymandering questionably concentrates voter support by lines drawn with records of those shown registered and turnout at the election consistently using NVRA / HAVA as a Federal matter under the authority of the EAC.

- Gerrymandering defeats the legitimate purpose of the Census that merely shows concentration and shift of persons from prior

decennial enumerations and that legally triggers state legislative ministerial duties to conform NYS subdivisions to protect subsidiarity for bottom-up home rule- isn't done and is a question denied certification.

II. Importance of the Issue

Words do not lie, only liars with ulterior motives do, and that based upon a simple reading in the best light of the requirements for constitutionality the New York State Constitution Article III, § 4, (see **App. 80**) and §5 of the State Constitution requires, among other things, that Senate district and ADs lines be drawn with the proviso that

> "*Such districts shall be so readjusted or altered that each senate district shall contain* ***as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable,*** *and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county.*"

This is not rocket science, but does require an honest reading in that any such district shall have an equal number of inhabitants, excluding aliens (aliens are those persons who are not U.S.

Citizens or Permanent Residents), including the diplomatic corps, tourists per se including those tourists at will or undocumented, and may not be an inhabitant with a domicile[5] under the full and complete jurisdiction of the state as they have allegiance to a foreign nation.

The New York Legislature and Executive have failed abysmally in the fiduciary mandate with ministerial duty to provide state sub-divisions that may contain at least one assembly district within and as such any claim that there is a good faith effort is missing because federal equal-population mandates and the existence of several counties whose populations are insufficient to support even a single assembly proves there has not been a good faith effort by the legislature or executive and is a taking of the right to bottom-up home rule subsidiarity.

Accordingly, notwithstanding any Court that has politically held that the Constitution is satisfied when "*the Legislature has made a good-faith effort to comply with * * * the equal-population principle * * * and has not unduly departed from our State constitutional command that the integrity of counties be preserved*" (Matter of *Schneider v Rockefeller* 31 N.Y.2d 420, 427, it is

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[5] Miriam Webster definition of DOMICILE (1) : a dwelling place : place of residence : home (2) a : a person's fixed, permanent, and principal home for legal purposes.

prima facie nonsense, because Counties per se may be resized as a ministerial duty and MUST be resized by the State at the stroke of the pen every ten years, and or otherwise, there must be a commensurate increase in the size of the assembly in proportion to the ratio of one senator to three assembly members, and in doing so thereby recreate the condition of at least one assembly district within or even with one senate district within for that matter – not hard at all but it takes a government of laws not the tyranny of men.

Until now, the standard for judicial review in this context is thus one akin to the notion of reasonableness. Under *Schneider*, only as far as the court would arbitrarily wish to go in what appears to be an unconditional constitutional directive may be satisfied as long as any departures therefrom are justifiable in view of the other legal and practical constraints to which the redistricting process is subject. Hence, while precedent has eased the strict county-integrity rule, the Legislature is not free to disregard it simply because it can point to other, legally sanctioned goals as the motivating force or "*benign*" motive behind its final product. Moreover, contrary to the majority's suggestion, the Legislature is not the sole arbiter of whether an appropriate balance has been struck between the strictures of that rule and the sometimes-competing values of population equality and enhancement of minority voting strength. As

important and deserving as those values unquestionably are, the Legislature is duty-bound to accommodate them within our constitutional framework, and the courts have both the right and the obligation to ensure that the demands of the State Constitution are, to the extent practicable, respected (*Matter of Sherrill v O'Brien*, 188 NY 185, 203-204; see Matter of *Schneider v Rockefeller*, supra, at 427 ["*(o)ur duty is to determine whether the legislative plan substantially complies with the * * * State Constitution*"]). Viewed against these principles, the redistricting plan at issue in 2002 cannot be upheld. A decision requires an honest unbiased court to read law in the most favorable light to benefit the people as a compelling state interest instead courts serve the oligarchy.

Contrary to the prevalent majority's analysis against the interests of the individual are crushed by the tyranny of the collective, and this derogation of the constitutional rule cannot be justified based on the competing commands of the federal equal-population requirement and the Voting Rights Act. As revealed by petitioners' submissions, at least one alternative plan exists that satisfies all of the requirements of federal law while dividing fewer counties and containing no bi-county districts. These plans establish that the Legislature's county-dividing choices were not dictated by practical necessity.

That the tolerance the majority has today expressed for a plan that all but disregards the integrity of county borders will be read by many as a signal that our State constitutional provisions no longer represent serious constraints on the critically important redistricting process. Certainly, although the majority has made passing reference to the "'historic and traditional significance of counties in the districting process'" (slip op., at 4-5, quoting *Matter of Orans* (15 N.Y.2d 339, 351), there is little in its analysis or result that suggests any real commitment to that principle. Inasmuch as it blindly may be deemed that this is a constitutionally prescribed principle to be important to the integrity of our redistricting system and inasmuch as the principle could have benn accommodated isn't in a federally satisfactory plan,

Anti-gerrymandering provisions that meet the express terms of one-person-one-vote, equal population and racial compliance in New York must also comply with the state constitution and is a state compelling interest that mandates:

- That each County sub-division or territory defined in the state constitution shall receive at least one Assembly member wholly within, with special regard to towns and cities with commensurate total inhabitants – means the State has an obligation to act – have not acted;

- That each County sub-division with the

prerequisite total inhabitants for two assembly members or more shall be redistricted with such assembly districts wholly within such county and that such be wholly within a respective senate district– means the State has an obligation to act – have not acted;

- That each existing county sub-division or territory with commensurate total inhabitants shall receive at least one state senator wholly within and that all assembly districts of the respective sub-division shall be contained wholly within the respective senate district– means the State has an obligation to act – have not acted;

- That the towns, villages and respective cities wholly within a County sub-division without an adequate number of total inhabitants for at least one assembly district wholly within shall by bottom-up initiative associate with adequate other towns villages and cities to provide for dedicated assembly representation wholly within the new sub-division, and or are to urge the state legislature to enlarge the number of Assembly and Senate members in a proportion of One (1) Senate member to three (3) Assembly members or be subject to the requirement of forced merger of towns / Villages cities into larger sub-division accordingly by the State Legislature according to NYSC Article 3 Section 5 (see **App. 84**)and by the *Mergers and Consolidation law* – means

the State has an obligation to act – have not acted;

- That State Legislative redistricting coincides with the needs of an eligible voter's home rule local district and the commensurate U.S. House Representative combined into a nested set so that the people and voter may have a reasonable expectation of bottom-up control of governance by consent of the governed – means the State has an obligation to act – have not acted.

III. Overview Rules of Redistricting

The U.S. Supreme Court has set forth different population equality standards for congressional districts and state legislative districts. Absolute equality is required for a state's congressional districts (plus or minus one person). State and local legislative districts may differ by no more than 10 percent of the smallest to the largest (plus or minus 5 percent), unless justified by some "rational state policy."

The state constitution (Article III, §2) *requires no less than* 150 Assembly districts and contains a formula for the determination of the number of Senate districts (Article III, §4). While the redistricting process is intended to reflect population changes, new districting plans are typically based on existing districts. Protection of incumbents has historically been a priority in

New York State, where the party in power draws lines for their house is nowhere to be found in the state or federal constitution is merely a habit and requires that the census tracks be assiduously used within the context of the State Constitution guarantee of bottom-up home rule structured to provide for nested representation subject to the will and consent of the people eligible to vote within.

IV. Standards for Drawing Lines

Several express provisions of New York's constitutional redistricting were effectively rendered obsolete in 1964, when the Supreme Court held that they violate the Equal Protection Clause of the 14th Amendment (*WMCA Inc. v. Lomenzo*, 377 U.S. 633). The standards that survive in the state constitution include compactness, contiguity, and preservation of political subdivisions. Judicially recognized principles applied in New York include incumbent protection and Voting Rights Act compliance.

V. One-Person-One-Vote Standard

Unlike the judicial analyses for racial and political Gerrymandering, the one person, one vote standard provides a seemingly straightforward numerical framework for analyzing mal-apportionment claims. However, this simplicity is misleading, for the Supreme Court has loosened the doctrine from its moorings since the moment

it was announced. As early as *Reynolds*, the Court conceded that absolute population equality among a state's legislative districts is pragmatically impossible. To be sure, delineating district boundaries across a state's diverse geographic terrain and its preexisting city or county boundaries is a difficult enough endeavor without having to make each election district equipopulous. Accordingly, *Reynolds* held that deviations from a strict equipopulous standard might be warranted. Possible justifications for these population deviations—enumerated and refined in the Court's subsequent one person, one vote jurisprudence—include "legitimate state policies" such as creating compact or contiguous election districts, respecting existing political boundaries, preserving existing districts, or avoiding elections between incumbent representatives. (Notably, the latter criterion explicitly sanctions politics as a legitimate redistricting consideration, a subject discussed more thoroughly in Part III. C of this Note.) The upshot is that a legislature need not strictly comply with one person, one vote as long as it meets two conditions: States must first and foremost make a "good faith effort" to achieve equipopulousness, and any deviations cannot be the result of an arbitrary or discriminatory state policy.

The Court has never articulated a clear-cut formula for how far reapportionment plans may deviate from one person, one vote; instead, it has

preferred to adjudicate these claims on a case-by-case basis.

This ad hoc approach means that the state's justification for the deviation—or perhaps more crucially, the Court's willingness to accept the justification as valid—is the determinant factor in the outcome of the case. For example, the Court rejected a Missouri congressional

Technologically speaking, though, redistricting is a much simpler process than it has ever been before. *See* Bullock, *supra* note 10, at 154. Even as early as 1983, the Supreme Court commented on how technology has facilitated reapportionment. *Karcher v. Daggett*, 462 U.S. 725, 733 (1983). Most redistricting bodies use advanced software such as Maptitude, which allows them to consider factors such as population and demographics and to configure and reconfigure district lines instantaneously. *See* Maptitude Geographic Information System (GIS) and Mapping Software, http://www.caliper.com/maptovu.htm (last visited Apr. 5, 2010).

To be fair, these types of claims are virtually indistinguishable.

Like one person, one vote claims, partisan gerrymandering claims originate in the Fourteenth Amendment's Equal Protection Clause and is meant to protect an individual's right to fair representation. Both types of claims prohibit

the strategic use of the reapportionment process to dilute the votes of a minority group. But in contrast to the Court's long dalliances with one person, one vote jurisprudence, the Court has flatly refused to adjudicate political gerrymandering claims. Indeed, political gerrymandering claims have been dying a slow death ever since the Court held them to be justiciable in *Davis v. Bandemer*.

What is perhaps the final nail in the political gerrymandering coffin arrived in 2004, when a plurality of the Supreme Court held that such claims are patently non-justiciable in *Vieth v. Jubelirer*. Which to adjudicate political gerrymandering claims based the Vieth decision on the premise that there are no manageable standards.

However, this reasoning does not square with the Supreme Court's one person, one vote line of cases, especially with its affirmation of *Larios v. Cox*. (Recall that in *Larios*, the U.S. District Court for the Northern District of Georgia found that the Georgia legislature had been improperly motivated by political considerations when redistricting its state legislature, and the Supreme Court summarily affirmed the district court's holding.) It is well-established that reapportionment is a political process; the Court has been steadfast in this regard. In *Gaffney v. Cummings*, the Connecticut legislature's politically motivated bipartisan gerrymander was

upheld as an acceptable apportionment of power among the state's major political parties.

When enumerating the traditional redistricting criteria in *Karcher v. Daggett*, the Court held that avoiding elections between incumbent representatives is a legitimate state policy that justifies deviating from the one person, one vote standard. However, aside from these two examples, the Court has not illuminated any specific guidelines for lower courts to follow; it has merely restated its premise that politics is part and parcel of redistricting. In terms of the ten percent rule, this is problematic: If reapportionment plans with less than ten percent deviations—such as the plan challenged in *Larios*—are presumptively constitutional, and partisan interests are acceptable grounds for redistricting, how are legislatures to know when they have gone too far.

Justice Scalia recognized this quandary, dissenting from the Supreme Court's opinion in *Larios* to the extent that the Court had not explicitly outlined the contours of permissible partisanship redistricting under the ten percent rule. In this way, *Larios* not only reinvigorated the debate about the meaning of the rule, but it also undermined the Court's reapportionment decisions to date. Where *Vieth* held that courts are not capable of determining whether excessive partisanship motivations exist in a straightforward political gerrymandering context,

Larios demonstrated that courts are perfectly capable of making these determinations under the rubric of one person, one vote. The problem with this paradox is pronounced under the ten percent rule, as plaintiffs with little hope of winning a political gerrymandering claim will instead turn to a one person, one vote claim for relief--and will most likely lose on that claim as well. Armed with a ten percent cushion and a blanket of privilege, it is no wonder then that legislatures can fall asleep at the wheel.

In affirming *Larios v. Cox*, Justices Stevens and Breyer called the one person, one vote doctrine the law's last safeguard against improper districting practices. However, this is not exactly so. The one person, one vote principle is intended to address the improper weighting of a vote, not the improper practice of gerrymandering district lines.

As discussed above, there are separate mechanisms by which to address gerrymandering—namely, partisan gerrymandering claims and racial gerrymandering claims under the Voting Rights Act. All three types of redistricting claims—numerical gerrymandering or one person, one vote claims, partisan gerrymandering claims, and racial gerrymandering claims—are doctrinally distinct and intended to remedy separate ailments. Where the one person, one vote principle is aimed at protecting individual voting rights, racial and partisan gerrymandering claims

are about the voting rights of a minority group. Where one person, one vote is about the size of electoral districts, gerrymandering is about the shape and location of district lines.

Despite these distinctions, the Supreme Court has conflated the one person, one vote doctrine with partisan gerrymandering claims. The Court has refused to adjudicate partisan gerrymandering claims because of a lack of judicially manageable standards, which are present in the New York State Constitution, —ostensibly because of the difficulty of distinguishing between permissible and impermissible political motivations in redistricting. these problems only promise to increase with the looming foreclosure of political gerrymandering claims, as more plaintiffs will disguise their political claims in the cloak of one person, one vote.

So if the current system is unworkable, what can be done to salvage it? Practically speaking, there are two options for restoring integrity and consistency to the one person, one vote line of jurisprudence: either declare state reapportionment plans that fall under a ten percent deviation to be legally unchallengeable instead of just theoretically so, or abandon the ten percent rule and require states to adhere to a more stringent standard of equipopulousness. While both solutions have benefits and drawbacks, this Note argues that abandoning the ten percent rule remains truer to the intent of one

person, one vote and gives states an administrable, unambiguous structure for redistricting. Each option is discussed below.

A. *Option One: Allow States to Deviate from Population Equality by Ten Percent Without Inquiring into Legislative Intent*

Because so many states have relied on *Brown*'s ten percent rule as a safe harbor that insulates them from the exacting requirements of one person, one vote—and have reapportioned their electoral districts accordingly —eliminating any inquiry into the state's motivations for enacting such a redistricting plan would largely maintain the status quo.

Challenges to reapportionment plans that fall below the ten percent threshold rarely succeed as it is, and simply deemphasizing or disposing of the inquiry into the state's "good-faith effort" to construct equipopulous districts is an efficient ex post facto means of reconciling one person, one vote jurisprudence. Indeed, there are definite benefits—including consistency, legitimacy, and predictability—to transforming *Brown*'s ad hoc bright line rule into a clear boundary that delineates constitutional and unconstitutional redistricting plans.

However, this does little to establish why ten percent is the acceptable level of deviation from the one person, one vote principle when eligible

voters are not the subject by broad use of the total population including tourists and diplomats and those not domiciled legally in the state, especially the city of New York (NYC) where thousands of tourists own real property in Manhattan and in effect when included as if legally domiciled deprive equal protection of districting requirement for those resident legally domiciled upstate. According to the NYSC NYC maintains an illegal debt ceiling with the use of tourists at will approaching 1.5 million persons.

Why cut off one person, one vote claims at ten percent deviations? The dicta in *Brown* that gave rise to the ten percent rule never explained why gerrymanders that remain below a ten percent level of deviation are constitutional. In fact, Justice Powell's opinion suggested that a sixteen percent deviation might be just as constitutionally tolerable.

Without any careful deliberation or data to support the ten percent figure, relying on the rule to distinguish between constitutional and unconstitutional reapportionment plans seems rather arbitrary. A similar concern was raised in *Karcher v. Daggett*, when the Supreme Court held that a stricter standard of population equality should apply to congressional reapportionment schemes. If the Court definitively accepts that legislatures can gerrymander by ten percent based on unreasoned dicta, it is a slippery slope to

the argument that a fifteen or even a twenty percent gerrymander is just as acceptable.

VI. New York Redistricting Cases

Fund for Accurate and Informed Representation, Inc. v. Weprin, 796 F. Supp. 662 (N.D. N.Y. 1992) (per curiam) *aff'd.* 506 U.S. 1017 (1992) (mem.)

The Fund for Accurate and Informed Representation (FAIR) challenged the redistricting plan for the New York Assembly. The complaint alleged that the plan adopted by the Assembly: (1) violated the one-person, one-vote requirement of the Fourteenth Amendment; (2) comprised a partisan gerrymander that discriminated against Republican voters; (3) diluted minority voting strength; and (4) violated the Fourteenth Amendment by fragmenting cohesive communities of interest and political subdivisions between Assembly districts.

After a summary trial, the Court concluded that the "challenges raised in plaintiffs' complaint are without merit." However, during the course of the trial the Department of Justice interposed an objection to two Assembly districts in Manhattan. Since the Legislature was unable to adopt a timely remedy, the Court directed the "Special Master to draw new district lines for them and for such contiguous districts as may thereby be affected, to bring those districts into compliance with the Voting Rights Act. With respect to the

remaining districts in the Assembly plan and the entire Senate plan, we defer to the legislature's plan and adopt its apportionment of those districts."

One Person, One Vote

The maximum population deviation in the Assembly plan, as conceded by the plaintiffs, was 9.43 percent. The Court held that "[t]his concession is fatal to the one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a prima facie case of discrimination under that principle sufficient to warrant further analysis by this Court."

The Court rejected "plaintiffs' contention that the state must justify an apportionment plan even though it creates a maximum deviation under 10 percent. While plaintiffs' argument may be correct in the context of state apportionment of Congressional districts . . . it has no application to apportionment of state legislative districts."

Partisan Gerrymandering

The Court also rejected plaintiffs' partisan gerrymandering claim. Since Republicans control the New York Senate, Republican voters cannot establish that the "Assembly apportionment plan deprives Republicans of an opportunity to

influence New York State's political process as a whole."

Intentional Racial Discrimination

Plaintiffs argued that the Assembly plan violated the Fourteenth and Fifteenth Amendments. Although plaintiffs conceded that the Assembly "harbored no design or purpose to discriminate against minorities," they contended that "a racially discriminatory motive [may be] inferred from an ultimate objective of keeping certain white incumbents in office."

The Court held that this claim failed for two reasons: (1) "Plaintiffs failed to demonstrate any linkage between the alleged fragmentation of minority communities in Monroe, Nassau, Erie or Westchester Counties, and an alleged intent to preserve the incumbency of certain white incumbents" and, (2) "Examining areas with substantial minority communities elsewhere in the state, we find apportionment that appears to consolidate minority populations - possibly in the interests of maximizing minority influence - rather than discriminatory fragmentation."

Voting Rights Act

The Court held that the plaintiffs failed to establish a voting rights violation. The Court initially noted that a state's redistricting law is

ordinarily accorded deference as a constitutionally compliant enactment.

The plaintiffs argued that the Assembly plan created too few majority-minority districts because it used too high a percentage of minority population to create an effective district. (The Assembly plan included nine districts with Black populations greater than 65 percent). The Court was not convinced that these districts were unlawfully packed.

The plaintiffs also claimed that § 2 of the Voting Rights Act requires that in areas where minorities are not sufficiently numerous to constitute a majority in a district, they should be consolidated into a single district to maximize their ability to influence elections. The Court declined to determine whether § 2 requires the creation of influence districts. Instead, the Court reasoned that even if influence districts are required, plaintiffs failed to sustain their burden of proof on the issue.

VII. State Constitution (Integrity of County Boundaries)

Wolpoff v. Cuomo, Order, No. 14757-1992 (N.Y. Sup. Ct., Bronx County, May 14, 1992) (removed to federal court), 792 F. Supp. 964 (S.D. N.Y. 1992) (remanded to state court), Order, No. 14757-1922 (N.Y. Sup. Ct., Bronx County, June 12, 1992)

Two separate challenges alleged that the legislative redistricting plan adopted by the New York State Senate violated article III, § 4 of the New York State Constitution. Article III, § 4 provides (shown at App. 80):

> Each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and may be in as compact form as practicable, and . . . shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county.

In *Wolpoff v. Cuomo*, plaintiffs' alleged that the redistricting plan "unconstitutionally fragments Bronx County into six separate Senate districts, only two of which are contained wholly within Bronx County, despite the fact that by virtue of population, Bronx County could support four wholly self-contained Senate districts." In *Dixon v. Cuomo*, plaintiffs' contended that the "redistricting plan is a rank partisan and personal-interest gerrymander that unnecessarily fragments counties throughout the State and creates districts that are neither compact nor contiguous."

The Senate Majority Leader sought to remove the *Wolpoff* case to federal district court pursuant to 42 U.S.C. §1443(2). However, the federal

district court remanded the case back to the state court. 792 F. Supp. 964 (S.D.N.Y. 1992).

Following argument, the Court struck down the Senate redistricting plan as violative of the State Constitution. The *Wolpoff* court held that the plan "excessively, gratuitously and without supervening need dictated by federal law, disregards the integrity of county boundaries in the creation of Senatorial districts."

Wolpoff v. Cuomo, 80 N.Y.2d 70, 587 N.Y.S.2d 560, 600 N.E.2d 191 (1992)

In 1992 the Senate Majority Leader filed an appeal in New York Court of Appeals. Although acknowledging that the "Senate redistricting plan technically violates the express language of the State Constitution," the Court nevertheless declared that the Senate "complied with the State Constitution as far as practicable" and upheld the plan.

The Court held in *Wolpoff v. Cuomo* that the Senate's plan and all plans submitted by the plaintiff's technically violated the State Constitution did not discuss the substance of the State Constitution as to the ministerial duty to guarantee that any county sub-division must be of sufficient population size to have at least one Assembly District wholly within entirely turns the question of required bottom-up subsidiarity on its head and imposes a top-down tyranny. However,

the Court reasoned that plaintiffs must show more than a technical violation of the State Constitution to succeed on their claim. The Court elaborated on the proper standard of review:

> [W]e examine the balance struck by the legislature in its effort to harmonize competing Federal and State requirements. The test is whether the legislature has *"unduly departed"* from the State Constitution's requirements regarding contiguity, compactness and integrity of counties . . . in its compliance with Federal mandates. It is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is . . . to determine whether the legislative plan substantially complies with the Federal and State Constitutions . . . . A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional *"only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the constitution has been resorted to, and reconciliation has been found impossible."*

The *Wolpoff v. Cuomo* Court initially determined that nearly half of the Senate districts cross

county lines and that "*for the first time in history, there are four pairs of bi-county districts.*" The Senate Majority Leader argued, however, that the districts were drawn in a "*good faith effort*" to comply with the requirements of one person, one vote and the Voting Rights Act, and not for partisan political reasons. The Senate plan had a maximum population deviation of 4.29 percent and the Department of Justice pre-cleared the portions of the plan subject to § 5 of the Voting Rights Act. The three counties subject to § 5 are Kings, New York, and Bronx.

The Court noted that all the plans submitted by the plaintiffs split fewer counties but contained higher population deviations. According to the Court:

> We are here to decide whether in complying with Federal mandates, the Legislature unduly undermined article III, § 4 of the State Constitution. That an alternative plan might have been devised that conflicted less with article III, § 4 but did greater violence to the equal representation principle is no basis for rejecting the Senate plan.

Although continuing to acknowledge the deficiencies in the Senate plan, the Court concluded that the plaintiffs could "*not overcome the presumption of constitutionality that attaches to the redistricting plan.*" In addition, the Court

recognized that "*balancing the myriad requirements imposed by both the state and Federal Constitution is a function entrusted to the Legislature. It is not the role of this . . . Court to second-guess the determination of the Legislature . . . in this regard.*" Finally, the Court determined:

> We find that the [Senate Majority Leader] has put forth more than enough evidence to support his argument that any such violation was minimized and that the district lines were drawn, as they were in order to comply with federal statutory and constitutional requirements. The Senate plan indeed compromises the integrity of 23 counties . . . . But [the Senate Majority Leader] has countered [plaintiffs'] allegations with a detailed defense of the proposed plan that is grounded in a complex analysis of population trends and voting patterns, and the way in which both must be accommodated in order to comply with federal requirements.

Puerto Rican Legal Defense and Education Fund v. Gantt, 796 F. Supp. 677 (E.D.N.Y. 1992), *injunction stayed sub nom. Gantt v. Skelos*, 504 U.S. 902 (1992) (mem.)

As a result of the 1990 census and subsequent apportionment, New York was entitled to 31 congressional seats, a loss of 3 seats. Because the New York Legislature appeared unable to timely

enact a new congressional redistricting plan, several suits were filed requesting that a court redraw the congressional boundaries. On March 26, 1992, a group of plaintiffs filed suit in the U.S. District Court for the Western District of New York (*Waring v. Gantt*, No. CV-92-1776). Also on March 26, 1992, another group of plaintiffs filed suit in New York Supreme Court, Kings County (*Reid v. Marino*, No. 9567/92). Finally, on March 31, 1992, this case was filed. *Waring* was consolidated with this case and a three-judge court was named.

The *Wolpoff v. Cuomo* Assembly defendants requested that the Federal Court abstain and allow the state case to proceed. The Senate defendants, joined by the plaintiffs, argued against abstention and in favor of the Court enjoining the state court proceeding. However, the Appellants herein contend that the issues now raised herein regarding the fiduciary duty of the State Legislature to conform the State subdivisions to protect the bottom-up subsidiarity of eligible voters has yet to be done.

The *Wolpoff v. Cuomo* Court declined to abstain and instead enjoined the state court from proceeding. The Court reasoned that only a plan drawn by a federal court could satisfy New York's election schedule. Under New York law, all congressional candidates were required to file signed petitions by July 16, 1992. In addition, Brooklyn, Manhattan and the Bronx are covered

by § 5 of the Voting Rights Act and require preclearance from the Department of Justice before any redistricting plan for these areas is effective. A plan drawn by a federal court, however, is not always subject to the preclearance requirement –and the issues remain as a result of a political end run around the state constitution using the Federal courts.

VIII. Erroneousness of Decisions below

Petitioner John-Joseph: Forjone (like William A. Gage in Washington County and William Bombard in Warren County) is an injured real property owner and eligible voter in Orleans County is denied a dedicated supreme court justice within the county, along with at least one Assembly member "wholly within" and as such favors outside special interests leaving the people and voters resident within without a dedicated voice within the Assembly to express urgency of the plight of those persons similarly situated within each home rule town within Orleans County. That the Assembly, Senate and Executive have an obligation to act, and have not acted to secure Petitioners' equal protection of the law with the State Constitution and federal compact.

Petitioner H.-William: Van Allen (like Faye Rabenda in Dutchess County, Ronald Loeber in Albany Count) is an injured real property owner and eligible voter in a County denied at least one Assembly member "wholly within" and without a

dedicated voice within the Assembly for the plight of those persons similarly situated within each home rule town within Ulster County are denied a competitive suffrage within in favor of a local oligarchy for control over the election of justices and administration of justice. That Ulster County has more than sufficient persons for at least one Assembly member wholly within that has more non-enrolled / independent voters than either the Democrats or Republicans, that like the Tea Party, are an alternative voice to the bias of the status quo twiddle Dee and twiddle Dum major parties who promote gerrymander injury without at least one Assembly member district wholly within to divide competition with impunity by legislative malice.

That Petitioner Christopher-Earl: Strunk in the 57th AD (like plaintiff Roy-Pierre: Detiege-Cormier in the 56th AD) is an injured eligible voter similarly situated within his assembly-member district that is not "wholly within" the respective 18th Senate District that has portions of eight other assembly districts similarly situated to prevent effective bottom-up direction of the 18th Senate district representative. That ALL assembly districts are to be wholly included as practicable within a senate district is intentionally ignored to infringe the efficient first amendment right of speech and petition of the persons within a unified assembly district to reasonably sway and direct the respective senator to act by consent of the people instead of outside

special interest is denied with lack of nested districts. That in Brooklyn without home-rule the number of overlapping assembly districts to that of a respective senate district varies from 4 portions per senate district to 12 portions per senate district. Gerrymandering without ADs wholly within a senate district is a denial of equal treatment and protection of law, and gross violation of the first and fifth, 9th and tenth amendment rights as a trespass by the taking of eligible voter one-person-one-vote rights.

That the State Constitution requires a nested relationship of state and U.S. House districts as practicable, is not done in clear violation of the 1st 9th and 10th amendment that were the State Constitution Article 3 Section 5 followed would prevent most gerrymandering with absolutely no violation or discrimination to a person of color in that if the AD is drawn without a violation upon pre-clearance review, then were included wholly within a respective SD. How could there possibly be a violation therein containing the same ADs?.

That all the plaintiffs have an injury related to gross maladministration of the express mandates of the State Constitution by the malice of the State in gerrymandering that is against a compelling state interest to which the Federal courts must abstain and guarantee. That in 2006 we discovered the State had even gerrymandered the Congressional district of Caroline McCarthy to steal votes from Peter King in the adjoining

Congressional district for three consecutive elections, and that when McCarthy no longer needed the gerrymander edge after the November 2006 general election she "corrected" the district to include plaintiff Gabriel Razzano back into the congressional district of Peter King from that of McCarthy; and when Razzano investigated the outrageous injury McCarthy then used her office to suppress the investigation using police action to silence speech, the investigation and taking property by coercion. All of which must be remanded back to district for remedy. If not done proves there is no downside for criminal gerrymander within a guarantee of one-person one vote for an eligible voter in the federal courts.

Petitioners having been injured where each do reside, and conclude that it is absolutely possible based upon the facts presented to reconcile the requirements of federal law with those of Article III, § 4 and 5, of our State Constitution by the very nature of subsidarity for which it operates without completely eviscerating the latter; and that Petitioners implore this matter is ripe for resolution herein. To suggest that the People of New York are without a state constitution is outrageously absurd bordering on criminality.

These are matters that are about to be repeat all over again with the 2010 Census enumeration because of the failure of the court system to administer justice without the status quo bias that maintain bad habits of oligarchic tyranny.

Plaintiffs after great expense to sustain a continued fight since 1999 for relief below are relegated to start all over again in a bad infinity. Although there are many more questions presented in the original case including the OSCE and NASS threat of interference with the people of the state of New York who are according to State Civil Rights law guaranteed protection against any New York Civil Rights Law Chapter 6 Art. 2 §2. "*Supreme sovereignty in the people. No authority can, on any pretence whatsoever, be exercised over the citizens of this state, but such as is or shall be derived from and granted by the people of this state.*" To reiterate:

1. Did the courts below err in failing to order use of the New York State Constitution Article III as to Article 9 for redistricting in 2002 in portions found constitutional as to one-person-one-vote and non-discrimination as to the Voting Rights Act ?

2. Did the courts below err in not ordering a three judge panel as with 28 USC 2284 in regards to statewide redistricting and 42 USC 1973-C?

3. Did the courts below err when permitting use of the 1993 National Voter Registration Act (NVRA) and 2002 Help America to Vote Act (HAVA) to undermine express use of the Census enumeration for redistricting without the State Constitution?

4. Did the courts below err when ignoring the relationship of the nesting requirements of all

districts drawn together required by the State Constitution?

5. Did the courts below err in use of one-person-one-vote as if eligible voter suffrage right is equated to those ineligible to vote?

6. Did the courts below err when *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (June 15, 1962) does not preclude further use of the State Constitution when interpreted only in the express SCOTUS dicta?

7. Did the courts below err when *Wolpoff v. Cuomo*, Order, No. 14757-1992 (N.Y. Sup. Ct., Bronx County, May 14, 1992) (removed to federal court), 792 F. Supp. 964 (S.D.N.Y. 1992) (remanded to state court), Order, No. 14757-1922 (N.Y. Sup. Ct., Bronx County, June 12, 1992) does not preclude further use of the State Constitution when interpreted only in the express terms of SCOTUS dicta?

8. Did the courts below err when *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (2004), aff'd 543 U.S. 997 (2004) does not preclude further use of the State Constitution when interpreted only in the express terms of express SCOTUS dicta?

9. Did the courts below err when the Defendants ignore existence of the State Constitution and related express SCOTUS dicta?

10. Did the courts below err when ignoring existence of the State Constitution for districting?

11. Did the Court err below when ignoring the provision of census enumeration as applies to counting tourists or aliens that neither are citizens or permanent residents of a State or USA, in that the 14th amendment *Section. 1* includes only those persons born or naturalized in the United States, and subject to the jurisdiction thereof as a domiciliary matter, and further, in "*Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.*"

NYC is a territory defined with the State of New York Constitution that expressly determines that the City of New York "territory" created with adjoining counties *wholly within* defined in the NYSC, together are too large as presently configured in that the once home-rule Counties are defunct Counties now considered only Boroughs without home-rule within NYC that is a "territory" as if a county with NYSC Article IX Local Governments Section 2(e) mandates quote:

> *(e) The rights and powers of local governments specified in this section insofar as applicable to any county within the city of New York shall be vested in such city.*

CONCLUSION

For the foregoing reasons as denial of a republican form of government, petitioners John-Joseph: Forjone, Christopher-Earl: Strunk, and H. William Van Allen, respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted by,

Dated: March 9, 2011
Lake Luzerne New York

John-Joseph: Forjone in esse

Dated: March 9, 2011
Brooklyn New York

Christopher-Earl: Strunk in esse

Dated: March 9, 2011
Hurley New York

H. William Van Allen in esse
Self-represented w/o an attorney
c/o 351 North Road
Hurley New York 12443
845-901-6767

MANDATE ISSUED on November 5, 2010

08-4323-cv
Loeber v. Spargo

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER (filed August 27, 2010)

RULINGS BY SUMMARY ORDER DO NOT EAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER TEE FEDERAL APPENDIX OR AN ELECTRONIC, DATABASE (WITH THE NOTATION SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of August, two thousand ten.

PRESENT:

ROSEMARY S. POOLER, ROBERT D. SACK,
REENA RAGGI, Circuit Judges.

Ronald G. Loeber, et al., Plaintiffs,

H. William Van Allen, Christopher Earl Strunk, John-Joseph Forjone, Plaintiffs-Appellants,

v.

Thomas J. Spargo, individually and as Justice of the NYS Supreme Court, et al., Defendants-Appellees.

Christopher Earl Strunk, pro se, Brooklyn, NY, for Plaintiff-Appellant *Strunk*.

H. William Van Allen, pro se, Hurley, NY, for Plaintiff-Appellant Van Allen.

08-4323-cv
Loeber v. Spargo

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRESENT:
ROSEMARY S. POOLER, ROBERT D. SACK,
REENA RAGGI, Circuit Judges.

Ronald G. Loeber, et al.,

Plaintiffs,

H. William Van Allen, Christopher Earl Strunk, John-Joseph Forjone,

Plaintiffs-Appellants,

Thomas J. Spargo, individually and as Justice of the NYS Supreme Court, et al.,

Defendants-Appellees.

Christopher Earl Strunk, pro se, Brooklyn, NY, for Plaintiff-Appellant *Strunk*.

H. William Van Allen, pro se, Hurley, NY, for Plaintiff-Appellant Van Allen.

John-Joseph Forjone, pro se, Clarendon, NY, for Plaintiff-Appellant Forjone.

Andrew Cuomo, Attorney General of the State of New York; Denise A. Hartman, Assistant Solicitor General; Andrew B. Ayers, Assistant Solicitor General, Albany, NY, for State Defendants-

Appellees.

Christopher C. Wang, Attorney; Mark L. Gross, Attorney; Thomas E. Perez, Assistant Attorney General; United States Department of Justice,

Civil Rights Division, Washington, DC, for Federal Defendants-Appellees.

Fay Ng, Assistant Corporation Counsel; Michael A. Cardozo, Corporation Counsel; The City of New York, Law Department, New York, NY, for City Defendants-Appellees.

Todd D. Valentine, State of New York Board of Elections, Albany, NY, for Defendants-Appellees New York *State* Board of Elections and Kosinski. No appearance, for Defendants-Appellees National Association of Secretaries of State and Ostego County Board of Elections. See Fed. R App. P. 3l(c). *

Appeal from a judgment and order of the United States District Court for the Northern District of New York (Kahn, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the district court are **AFFIRMED.**

Plaintiffs-Appellants Strunk, Forjone, and Van Allen, proceeding pro se, appeal the district court's judgment dismissing their amended complaint alleging that a 2002 plan reapportioning and redistricting New York State's legislative districts was unconstitutional under the constitutions of the United States and New York State. Strunk also appeals from the district court's post-judgment

order denying his motion for reconsideration of the underlying July 2008 dismissal order. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiffs' favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,570 (2007). A claim will have facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

As an initial matter, because Appellants' *opening* brief fails to challenge the district court's January 2008 dismissal of their claims based on the False Claims Act and the Help America Vote Act, they have waived any such challenge. See *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995); see also *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.*

V., 412 F.3d 418,428 (2d Cir. 2005) ("Arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief."). Additionally, because Appellants' opening brief does not challenge the January 2008 dismissal of their claims against any defendants other than the State Defendants, they have similarly waived any such challenge. See *Losacco,* 71 F.3d at 92-93.

Appellants argue that the district court erred by adjudicating their amended complaint as a single judge, instead of having it adjudicated by a three-judge panel pursuant to 28 U.S.C. §2284. Section 2284 provides that "[a] district court of three judges shall be convened. . . when an action is fled challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. §2284(a) (emphasis added). Although section 8 2284 is jurisdictional, "it has long been held that a single judge may dismiss a claim that must normally be heard by a three-judge court if it is 'insubstantial. '" *Kalson v. Paterson*, 542 F.3d 281,287 (2d Cir. 2008) (citing *McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975)). "An insubstantial federal claim is not a claim validly brought under federal law." Id. (emphasis in original). The Supreme Court has described an insubstantial claim as one "'obviously without merit or clearly concluded by [the Supreme Court's] previous decisions.'" Id. at 288 (quoting *McLucas,* 421 U.S. at 28). We conclude that the claims were

insubstantial, and, thus, the district court properly dismissed the amended complaint without transferring it to a three-judge panel. The claims in the amended complaint were barely comprehensible, and the only portions of the claims that could be intelligibly discerned from it were alleged violations of the New York State Constitution, not federal law. See *McLucas*, 421 U.S. at 28; Kalson, 542 F.3d at 287.

We further conclude that the district court properly dismissed the amended complaint. An independent review of the amended complaint confirms that it did not present any discernable federal constitutional claim related to reapportionment. While Appellants clearly invoked their federal constitutional rights to equal protection and substantive due process, it is difficult to discern the theory connecting that invocation to their claim that the 2002 redistricting should have been limited to the "citizen voting age population," rather than the "voting age population." Additionally, the amended complaint did not make clear how Appellants were injured by the State Defendants' actions, but appeared to imply that their votes were diluted by the inclusion of aliens for the purposes of apportionment. In any event, the claim rests on the false assumption that the New York State Constitution requires that apportionment of the state assembly and senate be based upon "inhabitants, excluding aliens." That phrase still exists in the text of *Art.* 3, §§4 (for apportionment of senate seats) and 5 (for

apportionment of assembly seats), but *Art.* 3, §5-a was subsequently amended to provide that "[f]or the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term 'inhabitants, excluding aliens' shall mean the whole number of persons." N.Y. Const. Art. 3, §5-a. Thus, the claim failed to plausibly state a claim upon which relief may be granted, and the district court properly dismissed it.

Appellants' other principal claim stemmed from their contention that the 2002 redistricting plan's provision of 26 senators to New York City violated the New York State Constitution requirements that "[no county shall have more than one-third of all the senators" and "no two counties . . . which are adjoining counties . . . shall have more than one-half of all the senators.'" N.Y. Const. Art. 3, § 4. As the district court correctly noted, Appellants' argument erroneously assumed that New York City was a single county. In their brief, Appellants acknowledge that New York City is more than a single county, but they argue that New York City's five counties are counties in name only and that, in essence, they operate as a single entity. Even if these claims were true, the argument still fails because the relevant requirements of *Art.* 3, §4 speak only of counties, not "entities," de facto counties, or anything else. Thus, the claim was properly dismissed.

Finally, we review for abuse of discretion a district court's order denying a Rule 60(b) motion for reconsideration. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998). "A district court would necessarily abuse its discretion-if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id. (internal quotation-marks omitted). Relief pursuant to Rule 60(b) is available only in "exceptional circumstances." *Ruotolo v. City of New York*, 5 14 F.3d 184, 191 (2d Cir. 2008) (internal quotation marks omitted).

After an independent review of the record, we conclude that the district court did not abuse its discretion in denying Strunk's reconsideration motion, and we agree with the district court that the motion sought solely to relitigate issues that had already been decided. We also reject Strunk's arguments that the district court judge erred by failing to recuse himself and answer certain questions about purported bias that Strunk posed in the reconsideration motion. Section 455 of Title 28, United States Code, provides in relevant part that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). The relevant question is whether "a reasonable person, knowing all the facts, [would] conclude that the trial judge's impartiality could reasonably be questioned" *United States v. Amico*, 486 F.3d 764,775 (2d Cir. 2007) (internal quotation marks

omitted). However, "judicial rulings alone almost never constitute valid basis for a bias or partiality motion," and "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540,555 (1994).

Here, we conclude that Strunk failed to show that the district court's "impartiality could, reasonably be questioned." *Amico*, 486 F.3d at 775. Furthermore, nothing in the record indicates that the district court acted partially or "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 5 10 U.S. at 555.

We have considered Appellants' remaining arguments and find them to be without merit.

Accordingly, we AFFIRM the judgment and order of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE .. SECOND CIRCUIT

08-4323-cv
Loeber v. Spargo

..

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of October, two thousand and ten.

Before:

ROSEMARY S. POOLER,
ROBERT D. SACK,
REENA RAGGI,
Circuit Judges.

Ronald G. Loeber, et al.,

Plaintiffs,

. . - .

. -.

H. William Van Allen, Christopher Earl Strunk, John-Joseph Forjone,

Appellants / Plaintiffs

. .

ORDER

Docket Number: 08-4323-cv

Christopher-Earl Strunk having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, *et al.*, Plaintiffs.

-against-

THOMAS SPARGO, individually and as Justice of the NYS Supreme Court, *et al.*, Defendants.

ORDER

Presently before the Court is a Letter Motion filed by Plaintiff Christopher Earl Strunk ("Strunk") requesting reconsideration of this Court's Order, dated July 31, 2008, dismissing the Amended Complaint and denying Plaintiffs' request for a three-judge panel under 28 U.S.C.A. §2284(a). Letter Motion (Dkt. No. 115); July 31 Order (Dkt. No. 109). Defendants have filed a response in opposition to Strunk's Motion. Response (Dkt. No. 117).

A. Legal Standard

The standard for granting a motion for reconsideration is strict, and "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked--matters, in other words, that might reasonably be expected to alter the conclusion

reached by the court." *Schrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The burden on a party moving for reconsideration of an order is thus substantial. *Toland v. Walsh*, No. 9:04- CV-0773, 2008 WL 657247, at *1 (N.D.N.Y. Mar. 7, 2008). There are only three possible grounds upon which motions for reconsideration may be granted: (1) an intervening change in law, (2) the availability of evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice. Shannon v. Verizon New York, Inc., 519 F.Supp.2d 304, 307 (N.D.N.Y. 2007) (citing *Doe v. New York City Dept. of Social Services.*, 709 F.2d 782, 789 (2d Cir. 1983). It appears that Strunk is basing his motion for reconsideration on a need to correct an error of law or to prevent manifest injustice.

B. Recusal

Initially, Strunk's Letter Motion appears to also suggest that the Court should recuse itself for "disparaging" Plaintiffs' rights unless the Court "is able to make a judgment free and clear of other commitments." Letter Motion at 1 (Dkt. 1 Dkt. No. 115). However, Plaintiff has not actually moved for recusal, and certainly not in any format that complies with the statutory requirements.

Plaintiff has also not alleged any basis that would warrant recusal under either of the two statutes that govern the recusal of federal judges--Sections 144 and 455 of the Judicial Code. 28 U.S.C. §§144,

455. So far as Section 144 is concerned, Plaintiff failed to file the requisite affidavit sufficiently alleging "that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." In addition, as the Supreme Court said in *Liteky*, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).2 Plaintiff has also failed to meet the requirements of Strunk then includes examples, asking whether the Court has taken any oath other than the oath of office, such as "a Masonic oath ... [or] a Kolnidre oath in which you must forgive all in your private capacity." Id.

It should also be noted also that the determination of whether such an affidavit is timely and legally sufficient is made by the judge whose recusal is sought. See, e.g., *Berger v. United States*, 255 U.S. 22, 32, 36 (1921); *LoCascio v. United States*, 473 F.3d 493, 498 (2d Cir. 2007) Section 455(a), which requires that a judge recuse when "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal." See *In re Aguinda*, 241 F.3d 194, 201 (2d Cir.2001) (quoting *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992)) ("Where a case, by contrast, involves remote, contingent, indirect or speculative interests, disqualification is not required.").

C. Discussion

Strunk then claims that by affecting Plaintiffs' rights, the July 31 Order

> "flies in the face of the NYS Civil Rights Law Chapter 6 Article 2 that guarantees quote: 'S 2. Supreme sovereignty in the people. No authority can, or any pretence whatsoever, be exercised over the citizens of this state, but such as is or shall be derived from and granted by the people of this state.'"

Letter Motion at 1-2.

To the extent that this argument appears to challenge the Court's personal jurisdiction over Plaintiffs, this claim is waived since it cannot be brought after the Court's disposition of the case, and since Plaintiffs already waived any challenge to the Court's personal jurisdiction over them by filing this suit. Fed. R. Civ. P. 12(h); see, e.g., *Andros Compania Maritima, S.A. v. Intertanker Ltd.*, 718 F.Supp. 1215, 1217 (S.D.N.Y.1989) (appearing and seeking affirmative relief from the Court is the paradigm of such a waiver) (citing *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938)).

Plaintiff Strunk next reiterates various legal arguments already presented to the Court regarding New York State Constitution's Article 3, Section 4 and the Plaintiffs' potential federal constitutional challenges to the redistricting plan. However, a motion for reconsideration "should not

be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader*, (quoting *Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 572 F.2d 953, 958 (2d Cir.1978), cert. denied, 439 U.S. 1072 (1979)) ("'a judge has an affirmative duty to inquire into the legal sufficiency of such an affidavit and not to disqualify himself unnecessarily . . .'"). 70 F.3d at 257. A motion for reconsideration is not to be used "for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple'... ." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) (citations omitted).

"Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). "Final judgments should not be lightly reopened." Id. Plaintiff has not alerted the Court to any overlooked controlling decision, constitutional provision, or data which may be reasonably expected to alter the Court's dismissal. Accordingly, Plaintiff has not established any "exceptional circumstances" under which reconsideration is warranted.

D. Conclusion

Therefore, based on the foregoing, it is hereby **ORDERED**, that the Plaintiff's Motion for reconsideration (Dkt. No. 115) is **DENIED**; and it is further

ORDERED, that the Court's July 31, 2008 Order, dismissing the Amended Complaint and denying Plaintiffs' request for a three-judge panel (Dkt. No. 109) is **AFFIRMED**; and it is further

ORDERED, that the Clerk serve a copy of this order on all parties.
IT IS SO ORDERED.

DATED: September 10, 2008
Albany, New York

Lawrence E. Kahn
United State District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, *et al.*, Plaintiffs,

-against-

THOMAS SPARGO, individually and as Justice of the NYS Supreme Court, *et al.*, Defendants.

ORDER

Presently before the Court is a Motion to Dismiss the Amended Complaint, filed by Defendants Thomas J. Spargo, Joseph L. Bruno, the State Senate, Sheldon Silver, the State Assembly, George E. Pataki, Randy A. Daniels, Eliot Spitzer and all members of the NYS Senate and Assembly previously named therein as John and/or Jane Doe's ("State Defendants") on April 9, 2008, seeking dismissal of the Amended Complaint in its entirety and denial of Plaintiffs' request for a three-judge panel under 28 U.S.C. § 2284. Dkt. No. 98. As per the Court's January 8, 2008 Decision, the State Defendants are the only Defendants remaining in this action. Dkt. No. 81.

I. Background

On October 15, 2004, *pro se* Plaintiffs filed a Complaint asserting, among other things, various constitutional violations arising out of the Help America Vote Act ("HAVA") (Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C. §15301-15545 (2002)).

Dkt. No. 1. On October 29, 2004, the Court dismissed the Complaint. Dkt. No. 5. On appeal, the Second Circuit, *inter alia*, dismissed all claims pertaining to the November 2004 elections, but remanded "the redistricting claims" including the issue of whether the case should be referred to a three-judge panel pursuant to 28 U.S.C. §2284. Dkt. No. 19.

Plaintiffs then filed the Amended Complaint, bringing forth fourteen (14) causes of action under HAVA and various other statutes, including 42 U.S.C. §§1983 and 1985. Dkt. No. 25. In addition to HAVA claims, Plaintiffs appear to challenge the reapportionment of the State of New York's current legislative, judicial and congressional districts. Id. at ¶29. By Decision and Order dated January 8, 2008, the Court dismissed all claims brought under HAVA and the False Claims Act, denied Plaintiffs' Motion for a preliminary injunction, and dismissed the apportionment claims as against the City of New York and Federal Defendants, as well as the National Association of Secretaries of State. Dkt. No. 81. The Court noted that the constitutionality of the redistricting plan was not yet before the Court at that time and that the State Defendants had not yet been heard on the issue and deferred decision on whether the redistricting claim required a three-judge court. Id. The Court further directed the Plaintiffs to name and properly serve the John and Jane Doe defendants or the action would be dismissed against them. Plaintiffs

thereafter served all members of the State Assembly and State Senate.

The State Defendants now seek to dismiss the Amended Complaint pursuant to F.R.C.P. 12(b)(6) and 12(c), as well as F.R.C.P. 8(a). Initially, however, the Court must consider whether it is necessary to convene a three-judge panel under 28 U.S.C. § 2284(a).

II. Discussion

Defendants argue that Plaintiffs have not presented any cognizable constitutional question, that the Plaintiffs lack standing, that the State Defendants are entitled to dismissal on the grounds of legislative immunity and lack of personal involvement, and that the claims remaining in the Amended Complaint do not pass muster under even the liberal standards of F.R.C.P. 8(a).

A. Legal Standard

As the Supreme Court has recently explained:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be

> enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal quotations, alterations and citations omitted). "*Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.*" Id. at 1965 n.3. "'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" Id. at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17 (1983)).

Thus, to survive a Rule 12 motion, Plaintiffs must pass the "'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).

B. Three judge panel

Defendants contend that because Plaintiffs lack standing and have not raised a substantial Constitutional issue, the case should be dismissed without convening a three-judge panel. Under 28 U.S.C. § 2284, "[a] district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). First, however, to determine whether a three-judge panel is required, the single judge must inquire (1) "whether the constitutional question raised is substantial"; (2) "whether the complaint at least formally alleges a basis for equitable relief"; and (3) "whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962).

A single judge may dismiss a claim if the Constitutional claim is insubstantial, *Bailey v. Patterson*, 369 U.S. 31, 33 (1962), or "if the plaintiff lacks standing or the suit is otherwise not justiciable in the district court." 17A C. *Wright & A. Miller, Federal Practice and Procedure* §4235, at 213 (2007); see also Long v. District of Columbia, 469 F.2d 927, 930 (D.C. Cir. 1972); Puerto Rican Intern. Airlines, Inc. v. Colon, 409 F.Supp. 960, 966 (D.P.R. 1975) ("[S]tanding . . . is a ground upon which a single judge can decline to convene a three judge court and order dismissal of

the complaint"); *Am. Commuters Ass'n v. Levitt*, 279 F.Supp. 40, 45-46 (S.D.N.Y. 1967)).

B. Analysis of Plaintiff's claims

In turning to the Amended Complaint, the Court is aware that because Plaintiffs are proceeding *pro se*, the Amended Complaint is to be construed liberally. *Phillips v. Girdich*, 408 F.3d 124, 127-28 (2d Cir. 2005). Initially, the Court notes that the first, fifth, ninth, tenth, eleventh, thirteenth, and fourteenth causes of action allege violations related to HAVA. These claims, however, were dismissed by the Court's Order dated January 8, 2008. Dkt. No. 81.

Plaintiffs' second cause of action (and possibly the sixth cause of action) alleges violation of New York State Constitution Article 3 Section 4 based on New York City's allotment of 26 senate districts. Not only does this claim rest on an incorrect assumption that New York City is a single county, as opposed to consisting of five separate counties, but Article 3, Section 4 was among the constitutional reapportionment provisions declared unconstitutional in *WMCA Inc. v. Lomenzo*, 377 US 63 (1963). Accordingly, this claim is hereby dismissed under F.R.C.P. 12(b)(6). A three-judge panel is not required to address this claim or to dismiss it. See *Bailey v. Patterson*, 369 U.S. at 33 (holding that a three-judge panel is not required "when the claim that a statute is unconstitutional

is wholly insubstantial, legally speaking nonexistent.")

Plaintiffs' remaining causes of action (third, fourth, sixth, seventh, eighth, and twelfth) do not comprehensibly refer to any federal provisions that are allegedly violated, and do not even all relate to redistricting or apportionment.[1] The Amended Complaint does not appear to present a discernable reapportionment claim under the federal constitution, such that there is no cause to convene a three-judge panel. Although Plaintiffs claim various injuries including, for example, discrimination[2] (Am. Compl. ¶ 30), "rotten boroughs injury" (¶ 32), and "disproportionate

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[1] The seventh cause of action may possibly make a possible gerrymandering claim, but as discussed below, a gerrymandering claim against the 2002 New York redistricting plan is insubstantial based on a prior decision.

[2] This comes from a very liberal construction of the following: "That Plaintiffs as US Citizens are denied equal protection and substantive due process suffer injury to individual Bottom up suffrage and Homerule autonomy of the PEOPLE within a municipal entity as a firewall against corruption entitled to a respective board of elections therein, suffer infringement of speech in the state legislature the US House, unequal due process in the judiciary and unreasonable unequally reimbursed unfunded financial burden upon New York citizen property differently than that for citizens of the several states, as a taking imposed by unconstitutional provisions of HAVA in the Congressional definition of "Voting Age Person" ("VAP") rather than "Citizen Voting Age Persons" ("CVAP"), is prima facie discrimination evidence proven in related case . . ." Am. Compl. ¶ 30.

diminished dilution injuries" (¶ 32), the Court is unable to decipher from the Amended Complaint a clear Constitutional claim challenging New York State's 2002 redistricting plan or the connection of any alleged Constitutional violations to any particular acts by the State Defendants. Accordingly, the Amended Complaint may be dismissed without convening a three-judge panel. See e.g., *Duckworth v. State Board of Elections*, 213 F. Supp. 2d 543 (D.M.D. 2002) (dismissing challenge to Maryland's congressional districting plan without referral to three-judge panel).

In addition, the Court notes that a constitutional question is insubstantial if prior decisions render the issue frivolous and leave no room for any inference of controversy. *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Bailey v. Patterson*, 369 U.S. at 33 (holding that a three-judge panel is not required when "prior decisions make frivolous any claim" of unconstitutionality). The redistricting plan presently challenged by Plaintiffs has already withstood scrutiny under constitutional challenges including one person-one vote, population-based and gerrymandering. *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (S.D.N.Y.), aff'd, 125 S.Ct. 627 (2004) (granting summary judgment and dismissing complaint because the redistricting plan did not violate the Fourteenth Amendment or the Voting Rights Act, but instead reflected traditional districting principles by maintaining equality of population). That decision upholding the redistricting plan was reached by a three-judge

panel and affirmed by the Supreme Court of the United States. Id.

As previously noted, a Court may dismiss a claim if the Constitutional claim is insubstantial, *Bailey v. Patterson*, 369 U.S. 31. In this case, there is a prior decision finding that the 2002 New York redistricting plan was constitutional. Even with a liberal construction of Plaintiffs' Amended Complaint, there are no possibly comprehensible redistricting claims brought by Plaintiffs that raise a controversy beyond the analysis in the prior decision. In addition, because Plaintiffs' claims, even when liberally construed, do not present a discernable reapportionment claim under the federal constitution, the Plaintiffs' Constitutional claims are hereby dismissed in their entirety.

III. Conclusion

Therefore, based on the foregoing, it is hereby **ORDERED**, that the Defendants' Motion to Dismiss (Dkt. No. 98) is **GRANTED**; and it is further

ORDERED, that Plaintiffs' request for a three-judge panel under 28 U.S.C. §2284(a) (Dkt. No. 104) is **DENIED**; and it is further

ORDERED, that the Amended Complaint (Dkt. No. 25) is **DISMISSED** in its entirety; and it is further

ORDERED, that the Clerk serve a copy of this order on all parties.

IT IS SO ORDERED.

DATED: July 31, 2008
Albany, New York

Lawrence E. Kahn
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-01193 (LEK/RFT)

RONALD G. LOEBER, *et al.*, Plaintiffs,

-against-

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court, *et al.*,

Defendants.

DECISION AND ORDER

Presently before the Court are objections to a Magistrate Judge's Order, filed by Christopher E. Strunk ("Plaintiff") on February 27, 2008. Dkt. No. 92. The objections challenges a two-month extension granted to the Attorney General's office in order for it to answer on behalf of numerous and various Senators and Assembly members who are currently named as "JOHN and JANE DOE" defendants in this matter. Magistrate Judge's Order (Dkt. No. 90); Letter Motion requesting extension (Dkt. No. 89).

In reviewing objections to a magistrate judge's non-dispositive order, under Fed. R. Civ. P. 72(a), "[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set

aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law."

Plaintiff argues that the two-month extension, characterized by Plaintiff as a three-year extension, is dispositive and thus improper, apparently also because Plaintiff had previously requested a three-judge panel. However, the Court finds that the two-month extension is reasonable, non-dispositive, and not contrary to law. Further, under 28 U.S.C. § 2284, a single judge may conduct all proceedings except the trial and may enter all orders permitted by the rules of
civil procedure except as provided by 28 U.S.C. § 2284. The Magistrate Judge's grant of the two-month extension was within his duties and authority under the Local Rules, and is not precluded by 28 U.S.C. § 2284. See L.R. 72.1-72.2. Therefore, the decision of the Magistrate Judge is neither clearly erroneous nor contrary to law.

Accordingly, it is hereby

ORDERED, that Plaintiff's Objections to the Magistrate Judge's Decision (Dkt. No. 92) are **DENIED**; and it is further

ORDERED, that the Magistrate Judge's Order dated February 21, 2008 (Dkt. No. 90) is

UPHELD; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: July 02, 2008
Albany, New York

Lawrence E. Kahn
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, et al, Plaintiffs,
v.
THOMAS J. SPARGO, et al., Defendants.

LAWRENCE E. KAHN
Senior United States District Judge

DECISION and ORDER

On October 15, 2004, Plaintiffs filed a Complaint asserting various constitutional violations arising out of the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C. § 15301-15545 (2002) ("HAVA") and, as best as the Court can decipher, the means by which New York reapportioned its legislative and judicial districts in April 2002. Among other things, Plaintiffs appear to claim that Defendants wrongfully counted the voting age population, rather than using the citizen voting age population, thereby using imprecise numbers in redistricting and determining eligibility for funds under the HAVA.

On October 29, 2004, this Court dismissed the Complaint. On appeal, the Second Circuit dismissed all election claims pertaining to the November 2004 elections and rejected Plaintiffs' claims of judicial bias. The Second Circuit

remanded the case with respect to the redistricting claims "with instructions to permit the filing of an amended complaint that omits unnecessary detail." The Circuit also directed this Court to consider whether this case necessitated a three judge panel pursuant to 28 U.S.C. § 2284.

On November 21, 2005, Plaintiffs filed an Amended Complaint. Shortly thereafter, Plaintiffs filed a motion for injunctive relief. That motion is pending. Also, pending before the Court are Motions to dismiss filed by the federal and City of New York Defendants. Dkt. Nos. 64,65.

I. STANDARD OF REVIEW

As the Supreme Court has recently explained:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal quotations, alterations and citations omitted). "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only

'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. at 1965 n.3. "'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" Id. at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983)).

As the Second Circuit has elaborated, "the [Supreme] Court's explanation for its holding [in Bell Atlantic] indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41, (1957). . . . [T]he [Supreme] Court expressly disavowed the oft-quoted statement in Conley of 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007).

Thus, to survive a Rule 12 motion, Plaintiffs must pass the "'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." Id. at 157-58. With this standard in mind, the Court will now address the pending motions.

II. DISCUSSION

a. Three-Judge Panel

In accordance with the Second Circuit's Mandate, the Court must first address whether it is necessary to convene a three-judge panel pursuant to 28 U.S.C. § 2284(a). That section provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determine whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) (discussing pre-1976 version of § 2284).

A single judge "in the first instance may consider those claims that do not require three judges and then call for the convening of a three-judge court only if the claims he has initially considered do not dispose of the case." 17A C. Wright & A. Miller, Federal Practice and Procedure § 4235, at 223 (2007). A single judge may dismiss a claim if the claim is insubstantial. *Bailey v. Patterson*, 369 U.S. 31 (1962). A "single judge can also dismiss if the

plaintiff lacks standing or the suit is otherwise not justiciable in the district court." 17A C. *Wright & A. Miller, Federal Practice and Procedure* § 4235, at 213 (2007); see also *Long v. District of Columbia*, 469 F.2d 927, 930 (D.C. Cir. 1972); *Puerto Rico Intern. Airlines, Inc. v. Colon*, 409 F. Supp. 960, 966 (D. P.R. 1975) ("[S]tanding is a ground upon which a single judge can decline to convene a three judge court and order dismissal of the complaint. . . ."); *Am. Commuters Ass'n v. Levitt*, 279 F. Supp. 40, 45-46 (S.D.N.Y. 1967).

Plaintiffs first challenge the funding scheme under the HAVA. HAVA was passed in 2002 to improve the administration of elections for federal office. HAVA "was enacted in response to problems identified during the 2000 presidential election, and requires, inter alia, that states create and maintain a computerized statewide voter registration list and create a provisional ballot system for people whose names do not appear on a particular polling station list." *Espada v. New York Bd. of Elections*, 2007 WL 2588477 (S.D.N.Y. 2007).

HAVA authorizes financial assistance to states to improve the administration of elections, improve election systems, educate voters, train election officials, improve accessibility to elections systems, etc. 42 U.S.C. § 15301.
Title I of HAVA provides for payments to states for election administration improvements and replacement of punch card and lever voting machines. See 42 U.S.C. §§15301-15306. The

amount of money provided to states under Title I is based, in part, upon the census determination of the "voting age population of the State." 42 U.S.C. § 15301(d).

Title II established the Election Assistance Commission to serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of federal elections. See 42 U.S.C. §§ 15321-15472. Certain funding is available under Title II which, again, is based, in part, upon "voting age population of the State" as determined by the census. 42 U.S.C. § 15402. Title III establishes certain minimum requirements for the administration of federal elections. 42 U.S.C. §§ 15481- 15512. The requirements imposed by Title III are unrelated to whether a state receives funding under Titles I or II. See, e.g., 42 U.S.C. § 15481(a) ("Each voting system used in an election for Federal office shall meet the following requirements. . . ."). Under Title IV, 42 U.S.C. §§ 15511-15512, the "Attorney General may bring a civil action against any State or jurisdiction . . . for such declaratory and injunctive relief . . . as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title [the Title III minimum requirements for the administration of federal elections]."

Nothing about HAVA, or Plaintiffs' claims thereunder, implicate the three-judge panel requirement under 28 U.S.C. § 2284. HAVA is unrelated to the apportionment of congressional districts or the apportionment of any statewide legislative body and no other act of Congress otherwise requires Plaintiffs' HAVA-related claims to be heard by a three-judge court. Further, for reasons to be discussed, the Court finds that Plaintiffs lack standing to assert claims under HAVA and their claims fail to state a claim upon which relief can be granted.

Plaintiffs do, however, assert claims concerning the constitutionality of New York's April 2002 redistricting plan. Section 2284 expressly requires a three-court judge for claims "challenging the constitutionality of the apportionment of congressional districts or . . . any statewide legislative body." Thus, Plaintiffs' claims appear to fall squarely within § 2284's requirement of a three judge panel. The federal defendants assert that a three-judge panel is not necessary because Plaintiffs' claims are insubstantial. "A constitutional question is insubstantial only if prior decisions render the issue inescapably frivolous and leave no room for any inference of controversy." *Loeber v. Spargo*, 04-5720-cv, at p.3 (2d Cir. Aug. 15, 2005) (citing *Goosby v. Osser*, 409 U.S. 512, 518 (1973)). The federal defendants' motion sheds little light on the substantiality of Plaintiffs' apportionment claim. It does not cite to any prior decisions that render Plaintiffs' Amended

Complaint inescapably frivolous. Further, the federal defendants were not involved in New York's redistricting plan and, thus, have little knowledge concerning these claims.

The Court does note, however, there are insufficient factual allegations in the Amended Complaint concerning the federal or City of New York Defendants to assert a plausible claim that they were involved in the State of New York's 2002 apportionment scheme. As will be discussed, prior decisions make it inescapably clear that to be held accountable in a 42 U.S.C. § 1983 action, the named defendant must have had some involvement in the alleged constitutional or statutory deprivation. Absent any factual allegations of involvement by the federal or City of New York Defendants in the 2002 apportionment, the claims against them are frivolous and leave no room for any inference of controversy. Accordingly, a three judge court is not necessary to dismiss the apportionment claims as to these Defendants.

The state defendants, on the other hand, were involved in the apportionment plan and are the appropriate parties to address the substantiality and merits of these claims. The state defendants have not moved to dismiss the Amended Complaint and have not otherwise addressed the applicability of § 2284. Because the constitutionality of the redistricting plan is not before the Court in connection with the pending motions and the state defendants have not yet been heard on this issue,

the Court defers decision on whether the redistricting related claims require a three-judge court until such issues are squarely presented for adjudication and the state defendants have an opportunity to be heard on the issue.

b. Standing

Having found that a three judge panel is not necessary at this time, the Court proceeds to review the pending motions. Defendants claim that Plaintiffs lack standing to assert claims under HAVA and that their claims otherwise fails to state a claim upon which relief may be granted.
As the Supreme Court recently stated:

> Federal courts must determine that they have jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). "We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only

> harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy." Id., at 573-574, 112 S. Ct. 2130. See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. ----, ----, 126 S. Ct. 1854, 1862, 164 L.Ed.2d 589 (2006) (refusing to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observing that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally' " (citation omitted)). *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007).

In their Amended Complaint, Plaintiffs appear to express dissatisfaction with the passage of HAVA, the funding mechanism established thereunder, and the amount of monies received by the State of New York. Plaintiffs also may be contending that HAVA constitutes an unfunded mandate on the State of New York.[3]

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[3] It is extremely difficult to decipher from Plaintiffs' Amended Complaint what their claims are and which Defendants are the subject of particular claims.

The Election Clause of the United States Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art 1. § 4. HAVA is a law that imposes certain requirements upon states with respect to the elections for senators and representatives. Under the Election Clause, New York was required to implement HAVA's requirements. This is so regardless of whether HAVA's mandates may be unfunded. See *Assoc. of Comm. Org. for Reform Now v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997); *Assoc. of Comm. Org. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995); see also *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) noting that

> ("[i]t cannot be doubted that these comprehensive words [in Article I § 4] embrace authority [in Congress] to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . The phrase 'such regulations' plainly refers to

> regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own.").

While Plaintiffs appear to suggest that New York has been denied certain funding under HAVA, Plaintiffs are not acting on behalf of, and do not have the right to asserts claims on behalf of, the State of New York. Further, Plaintiffs have failed to articulate any injury sustained by them because of New York's failure to receive certain federal funds. There are no allegations that they have been unable to vote, that their votes have otherwise been diminished because of the non-receipt of funding under HAVA, or that they have been subjected to discriminatory or otherwise unfair registration laws or procedures in the context of any federal election. In *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), by contrast, the Sixth Circuit held that the plaintiffs had standing to assert claims under 42 U.S.C. § 15482 (HAVA Title III § 302) because they were asserting their individual
rights under HAVA to cast provisional ballets - something for which HAVA specifically provides. See 42 U.S.C. § 15482

> ("If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to

> vote and that the individual is eligible to vote . . . but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot. . . .").

Here, Plaintiffs are not asserting any such clear, individual right under HAVA. Rather, they are challenging the general funding scheme thereunder. *Espada*, 2007 WL 2588477, at *4.

More importantly, any allegation that Plaintiffs have been injured as a result of HAVA's funding scheme is implausible because New York's receipt of funding thereunder is irrelevant to Plaintiffs' voting rights. New York is required to implement HAVA's minimum standards regardless of whether it applied for, and received, HAVA monies. See 42 U.S.C. §§ 15481-15485. Finally, there is no basis upon which to conclude that HAVA created a private cause of action with respect to the administration of funds authorized under the Act. See *Paralyzed Veterans of Am. v. McPherson*, 2006 WL 3462780 (N.D. Cal. 2006).

Plaintiffs are unable to demonstrate any injury resulting from the passage of the HAVA or the funding mechanism established thereunder, causation between any alleged injury and the HAVA funding mechanism, or redressability. Accordingly, Plaintiffs do not have standing to

assert any claims under HAVA, and have failed to state a claim upon which relief can be granted. Accordingly, all claims brought under HAVA are DISMISSED.[4]

c. City of New York and Federal Defendants' Motion to Dismiss the Apportionment Claims

The federal and City of New York Defendants move to dismiss the apportionment claims against them on the ground that they had no involvement in any of the complained of actions. A defendant in a case brought pursuant to 42 U.S.C. § 1983 can only be held responsible for constitutional deprivations caused by its acts or failures to act. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (requiring personal involvement as a prerequisite to an award of damages under 42 U.S.C. § 1983); *Reynolds v. Giuliani*, 506 F.3d 183, 190 (2d Cir. 2007); *Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007); *Zahrey v. Coffey*, 221 F.3d 342, 349-352 (2d Cir. 2000) (discussing causation in § 1983 claims). To be held accountable, the defendant must have been involved in causing the claimed constitutional violation. Id.

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[4] Plaintiffs' motion for a preliminary injunction is denied because: (1) it is moot (it sought 2 to enjoin certain 2006 deadlines which have now passed), see Independence Party of Richmond County v. Graham, 413 F.3d 252, 256 (2d Cir. 2005), and (2) it is predicated upon HAVA. As discussed, the Court has found that Plaintiffs do not have standing to assert claims under HAVA and have failed to state a claim upon which relief can be granted.

The Amended Complaint asserts claims concerning New York's 2002 redistricting plan. There are no factual allegations linking the federal or City of New York Defendants to the apportioning of districts throughout New York State. Accordingly, any constitutional claims against these Defendants concerning the apportionment claims are not plausible and must be dismissed.[5]

d. Cross-Motion to Change Venue

Plaintiffs cross-move to change venue to the Western District of New York where a similar action was pending. This motion must be denied because: (1) venue is appropriate in this District, see 28 U.S.C. § 1391(b), (2) there is no basis for a transfer under 28 U.S.C. §1404; (3) although an identical action was pending in the Western District of New York, this action was filed first, see *Kellen Co., Inc. v. Calphalon Corp.*, 54 F. Supp.23

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[5] For similar reasons the amended Complaint must be dismissed as to Defendant National Association of Secretaries of State. There are no allegations of any involvement by this Defendant in any of the conduct alleged in the Amended Complaint.

Although Plaintiffs make reference in their Amended Complaint to the False Claims Act , 31 U S C § 3729, the reason for t his reference is unintelligible There are insufficient factual allegations in the Amended Complaint making a False Claims A ct claim plausible Accordingly, all claims against the federal defendants and all claims under the False Claims Act must be dismissed.

218, 221 (S.D.N.Y. 1999), and Plaintiffs have failed to articulate an exception to the "first filed" rule; and (4) the Western District of New York transferred venue of its case to this District and, thus, there is no longer any related action pending in the Western District of New York.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that the federal defendants' motion to dismiss the Amended Complaint against it in its entirety is **granted**; and it is further

ORDERED, that all claims predicated upon the HAVA are **dismissed**; and it is further

ORDERED, that all claims against the City of New York are **dismissed**; and it is further

ORDERED, that all claims under the False Claims Act and all claims against the National Association of Secretaries of State are **dismissed**; and it is further

ORDERED, that unless Plaintiffs name and properly serve the John and Jane Doe Defendants within thirty days of the date of this Order, this action shall be dismissed as to them; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties

IT IS SO ORDERED.

Dated: January 08, 2008
Albany, New York

Lawrence E, Kahn
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, WILLIAM E. BOMBARD, WILLIAM A. GAGE, JOHN-JOSEPH FORJONE, H. WILLIAM VAN ALLEN, FAIRLENE G. RABENDA, ROY-PIERRE DETIEGE-CORMIER, RONALD E. SACOFF, GABRIEL RAZZANO, EDWARD M. PERSON, JR., CHRISTOPHER EARL STRUNK, and AD HOC NEW YORK STATE CITIZENS FOR CONSTITUTIONAL LEGISLATIVE REDISTRICTING,

Plaintiffs,

v.

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court; JOSEPH L. BRUNO; 61 JOHN AND JANE DOE NYS SENATORS, all individually and as state senators past and present; SHELDON SILVER; 149 JOHN AND JANE DOE NYS ASSEMBLY MEMBERS, all individually and as past and present; GEORGE E. PATAKI, individually and as NYS Governor; RANDY A. DANIELS, NYS Secretary of State with authority and repository for corporations and unincorporated associations service; ELIOT SPITZER, per CPLR 1012, New York State Attorney General; NATIONAL ASSOCIATION OF SECRETARIES OF STATE "NASS"; LESLIE REYNOLDS, Executive Director for the Executive Committee;

PETER KOSINSKI, individually and in his official capacity at the NASS; and JOHN ASHCROFT, per 28 USC 2403, the United States Attorney General,
Defendants.

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SCULLIN, Chief Judge

AMENDED ORDER

On October 4, 2005, this Court issued an Order in which, among other things, it instructed either Ms. Miller or Mr. Smirlock or another attorney in their Office . . . [to] either file a Notice of Appeal on behalf of Defendants within **FIFTEEN DAYS** of this Order if they intend to continue to represent Defendants in this action or notify the Court whether Defendants will be proceeding *pro se* or whether they will be represented by other counsel. *See* October 4, 2005 Order at 6.

Subsequently, it was brought to the Court's attention that there is an obvious typographical

error in the above-cited paragraph. The Court's intent was for either Ms. Miller or Mr. Smirlock or another attorney in their Office to file a "Notice of Appearance" **not** a "Notice of Appeal." Accordingly, the Court hereby

ORDERS that the above-cited paragraph is **AMENDED** to read as follows:

ORDERS that either Ms. Miller or Mr. Smirlock or another attorney in their Office shall either file a Notice of Appearance on behalf of Defendants within **FIFTEEN DAYS** of this Order if they intend to continue to represent Defendants in this action or notify the Court whether Defendants will be proceeding *pro se* or whether they will be represented by other counsel. and the Court further **ORDERS** that, in light of this Amended Order, Defendants' counsel is hereby

GRANTED a **FIFTEEN DAY** extension of time in which to comply with the Court's instructions in the above-cited paragraph.

IT IS SO ORDERED.
Dated: October 17, 2005
Syracuse, New York

Frederick J. Scullin, Jr.
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, WILLIAM E. BOMBARD, WILLIAM A. GAGE, JOHN-JOSEPH FORJONE, H. WILLIAM VAN ALLEN, FAIRLENE G. RABENDA, ROY-PIERRE DETIEGE-CORMIER, RONALD E. SACOFF, GABRIEL RAZZANO, EDWARD M. PERSON, JR., CHRISTOPHER EARL STRUNK, and AD HOC NEW YORK STATE CITIZENS FOR CONSTITUTIONAL LEGISLATIVE REDISTRICTING,

Plaintiffs,

v.

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court; JOSEPH L. BRUNO; 61 JOHN AND JANE DOE NYS SENATORS, all individually and as state senators past and present; SHELDON SILVER; 149 JOHN AND JANE DOE NYS ASSEMBLY MEMBERS, all individually and as past and present; GEORGE E. PATAKI, individually and as NYS Governor; RANDY A. DANIELS, NYS Secretary of State with authority and repository for corporations and unincorporated associations service; ELIOT SPITZER, per CPLR 1012, New York State Attorney General; NATIONAL ASSOCIATION OF SECRETARIES OF STATE "NASS"; LESLIE REYNOLDS, Executive Director for the Executive Committee;

PETER KOSINSKI, individually and in his official capacity at the NASS; and JOHN ASHCROFT, per 28 USC 2403, the United States Attorney General,
Defendants

APPEARANCES OF COUNSEL

RONALD G. LOEBER
Altamont, New York 12009
Plaintiff *pro se*

WILLIAM E. BOMBARD
Glens Falls, New York 12801
Plaintiff *pro se*

WILLIAM A. GAGE
Hampton, New York 12837
Plaintiff *pro se*

JOHN-JOSEPH FORJONE
Clarendon, New York 14429
Plaintiff *pro se*

H. WILLIAM VAN ALLEN
Hurley, New York 12443
Plaintiff *pro se*

FAIRLENE G. RABENDA
Poughkeepsie, New York 12603-5606
Plaintiff *pro se*

ROY-PIERRE DETIEGE-CORMIER

Brooklyn, New York 11213
Plaintiff *pro se*

RONALD E. SACOFF
Staten Island, New York 10312
Plaintiff *pro se*

GABRIEL RAZZANO
Freeport, New York 11520
Plaintiff *pro se*

EDWARD M. PERSON, JR.
Plaintiff *pro se*

CHRISTOPHER EARL STRUNK
Brooklyn, New York 11238
Plaintiff *pro se*

SCULLIN, Chief Judge

ORDER

Although District Judge Kahn is the assigned judge for this matter, one of the Plaintiffs, Christopher Earl Strunk, sent a letter directly to the undersigned in which he requested reassignment of this case to a different district judge.[6] *See* Letter from Christopher Earl Strunk,

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[6] In his letter, Mr. Strunk states that he is "a Plaintiff pro se without being an attorney in the referenced case, and as such I have been elected by the other Plaintiffs, who each is

dated September 5, 2005, at 1. [7] Specifically, Mr. Strunk sought the recusal of Judge Kahn "from the above referenced redistricting gerrymandering injury case under 28 USC 455." *See id.*[8]

By Decision and Order dated October 29, 2004, Judge Kahn *sua sponte* dismissed this action on the ground that Plaintiffs had not met the constitutional requirement that their claims presented a case or controversy. *See* Dkt. No. 5 at 4. Specifically, he found that Plaintiffs had alleged violations of the law that had not yet occurred and that none of these allegations had, thus, ripened into a controversy. *See id.* He also concluded that

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representative of a class of Eligible Voters ("EVs") as the PEOPLE resident within a municipal entity with *Bottom-up* guarantee of suffrage and autonomy being denied there . . . ." *See* Letter, dated September 5, 2005, at 1 (footnote omitted)

[7] Mr. Strunk did not send a copy of his letter to Judge Kahn He did, however, send copies to the Clerk of the Court, Defendants' Counsels, Plaintiffs, The Honorable Michael A. Cardozo, Esq Corporation Counsel of the City of New York. *See* Letter, dated September 5, 2005, at 6. He also sent copies of this letter to the following people "[f]or the[ir] information" The Honorable District Judge Jack B. Weinstein, The Honorable District Judge Norman A Mordue, Counsels for Parties in the Arbor Hill Case (over which Judge Mordue apparently presided), and Joel Graber, NYS Assistant Attorney General. *See id.*

[8] Although he does not explicitly say so, it appears to the Court that Mr Strunk's request stems from his belief that Judge Kahn's previous actions in this case indicate a bias on his part against Plaintiffs' claims.

Defendants were not the proper parties to the action and that Plaintiffs had not joined other necessary parties. *See id.* (citation omitted).

On November 1, 2004, Plaintiffs filed a Notice of Appeal from that Decision and Order and the accompanying Judgment. *See* Dkt. No. 9. By Summary Order dated August 13, 2005, the United States Court of Appeals for the Second Circuit dismissed the appeal in part, vacated Judge Kahn's judgment in part and remanded the case, and denied several motions that Plaintiffs had filed in that court. *See* Dkt. No. 19 at 2. [9] Specifically, the Second Circuit dismissed the appeal with respect to the claims related to the November 2004 election because they were moot.
See id. at 3. With regard to the remainder of Plaintiffs' claims, however, after noting that "the district court failed to present any discussion as to its decision to dismiss" those claims and noting that "[t]he complaint . . ., while prolix and burdensome both for the court and for appellees, can nonetheless be read and comprehended to plead at least some claims that are not frivolous on their face," the Second Circuit "vacate[d] the district court's order as to the redistricting claims and remand[ed] with instructions to permit the filing of an amended complaint that omits unnecessary

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[9] Although the Second Circuit issued its Summary Order on August 13, 2005, it did not issue the Order as a Mandate until September 13, 2005. *See* Dkt. No. 19.

detail." *See id.* (citation omitted). [10] Moreover, the Second Circuit instructed the district court that it

> should . . . be mindful of the requirements of 28 U.S.C. § 2284, and that its inquiry regarding whether to refer the matter to a three-judge panel is limited to 1) "whether the constitutional question raised is substantial"; 2) "whether the complaint at least formally alleges a basis for equitable relief"; and 3) "whether the case presented otherwise comes within the requirements of the three-judge statute."

See id. (quotation omitted).

Finally, the Second Circuit noted that it "ha[d] reviewed [Plaintiffs'] additional arguments concerning judicial bias and lack of notice of the October 2004 order to show cause hearing, and f[ou]nd them to be without merit." *See id.*

In compliance with the Second Circuit's mandate, Judge Kahn issued an Order dated September 22, 2005, in which he directed Plaintiffs to file an amended complaint within sixty days of the Order or the court would dismiss the action. *See* September 22, 2005 Order at 2. Judge Kahn also advised Plaintiffs that their amended complaint had to comply "with the requirements of **Federal**

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[10] The Second Circuit also reminded the district court that it "should be mindful of [the Circuit's] well-established principle that pro se complaints are to be construed liberally." *See* Dkt. No. 19 at 3.

Rule of Civil Procedure 8(a)(2) in omitting unnecessary detail . . . ." *See id.* He also instructed Plaintiffs that if they "request[ed] a three-judge court [in their amended complaint], pursuant to **29 U.S.C. § 2284**, [their] pleadings shall conform with **Northern District Local Rule 9.1** . . . ." *See id.* Finally, Judge Kahn advised the parties that,

> if Plaintiffs should file an amended complaint seeking a three-judge court, all parties to this action, within **THIRTY (30) DAYS** of the filing of said amended complaint by Plaintiffs, shall submit briefing that addresses whether there is a need for a three-judge panel to consider the issues in this case pursuant to the provisions of **28 U.S.C. § 2284**. Said briefing shall conform with the requirements of **Northern District Local Rules 9.1 and 10.1(a) & (b)**, and shall not exceed **TEN (10) PAGES** in length . . . .

See id.

Accordingly, in light of the fact that Judge Kahn's September 22, 2005, provides Plaintiffs with an opportunity to amend their complaint – which is, in a nutshell, the relief that they seek – and that the Court finds that Plaintiffs have presented absolutely no evidence of any bias on Judge Kahn's part with respect to their claims, the Court hereby

ORDERS that Plaintiffs' request for reassignment of this matter to a different judge is

DENIED; and the Court further

ORDERS that the Clerk of the Court serve a copy of this Order on Plaintiffs and serve a **courtesy** copy of this Order on the following attorneys who, according to the Second Circuit's Summary Order, *see* Dkt. No. 19, appeared on Defendants' behalf in opposition to Plaintiffs' appeal

Jennifer Grace Miller, Assistant Solicitor General
Daniel Smirlock, Deputy Solicitor General
Office of the New York State Attorney General – Appeals and Opinions Division
The Capitol
Albany, New York 12224;

and the Court further

ORDERS that either Ms. Miller or Mr. Smirlock or another attorney in their Office shall either file a Notice of Appeal on behalf of Defendants within **FIFTEEN DAYS** of this Order if they intend to continue to represent Defendants in this action or notify the Court whether Defendants will be proceeding *pro se* or whether they will be represented by other counsel.

IT IS SO ORDERED.
Dated: October 4, 2005
Syracuse, New York

Frederick J. Scullin, Jr.

Chief United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:04-CV-1193 (LEK/RFT)

RONALD G. LOEBER, WILLIAM E. BOMBARD, WILLIAM A. GAGE, JOHN-JOSEPH FORJONE, H. WILLIAM VAN ALLEN, FAIRLENE G. RABENDA, ROY-PIERRE DETIEGE-CORMIER, RONALD E. SACOFF, GABRIEL RAZZANO, EDWARD M. PERSON, JR., CHRISTOPHER EARL STRUNK, and AD HOC NEW YORK STATE CITIZENS FOR CONSTITUTIONAL LEGISLATIVE REDISTRICTING,

Plaintiffs,

v.

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court; JOSEPH L. BRUNO; 61 JOHN AND JANE DOE NYS SENATORS, all individually and as state senators past and present; SHELDON SILVER; 149 JOHN AND JANE DOE NYS ASSEMBLY MEMBERS, all individually and as past and present; GEORGE E. PATAKI, individually and as NYS Governor; RANDY A. DANIELS, NYS Secretary of State with authority and repository for corporations and unincorporated associations service; ELIOT SPITZER, per CPLR 1012, New York State Attorney General; NATIONAL ASSOCIATION OF SECRETARIES OF STATE "NASS"; LESLIE REYNOLDS, Executive Director for the Executive Committee;

PETER KOSINSKI, individually and in his official capacity at the NASS; and JOHN ASHCROFT, per 28 USC 2403, the United States Attorney General,
Defendants.

ORDER

Pursuant to the Mandate from the United States Court of Appeals for the Second Circuit, issued September 13, 2005, it is hereby

ORDERED, that Plaintiffs be advised that unless they file an amended Complaint within **SIXTY (60) DAYS** of the date of the filing of this Order, conforming the Complaint with the requirements of **Federal Rule of Civil Procedure 8(a)(2)** in omitting unnecessary detail, this action will be **dismissed**.

If Plaintiffs request a three-judge court, pursuant to **28 U.S.C. § 2284**, pleadings shall conform with **Northern District Local Rule 9.1**; and it is further

ORDERED, that if Plaintiffs should file an amended complaint seeking a three-judge court, all parties to this action, within **THIRTY (30) DAYS** of the filing of said amended complaint by Plaintiffs, shall submit briefing that addresses whether there is a need for a three-judge panel to consider the issues in this case pursuant to the provisions of **28 U.S.C. § 2284**. Said briefing shall conform with the requirements of **Northern District Local Rules 9.1**

and 10.1(a) & (b), and shall not exceed **TEN (10) PAGES** in length; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

DATED: September 22, 2005
Albany, New York

Lawrence E. Kahn
United States District Judge

2005 U.S. App. LEXIS 17480,*;144 Fed. Appx. 168 Loeber v. Spargo, 2008 U.S. Dist. LEXIS 1416 (N.D.N.Y, Jan. 8, 2008)

RONALD G. LOEBER, WILLIAM E. BOMBARD, WILLIAM A. GAGE, JOHN-JOSEPH FORJONE, FAIRLENE G. RABENDA, ROY-PIERRE DETIEGE-CORMIER, RONALD E. SACOFF, GABRIEL RAZZANO, EDWARD M. PERSON JR., AD HOC NEW YORK STATE CITIZENS FOR CONSTITUTIONAL LEGISLATIVE REDISTRICTING, Plaintiffs, H. WILLIAM VAN ALLEN, CHRISTOPHER EARL STRUNK,

Plaintiffs-Appellants,

-v-

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court, 61 JOHN AND JANE DOE NYS SENATORS, all individually and as state senators past and present, 149 JOHN AND JANE DOE NYS ASSEMBLY MEMBERS, all individually and as past and present, GEORGE E. PATAKI, individually and as NYS Governor, RANDY A DANIELS, NYS Secretary of State with authority and repository for corporations and unincorporated associations service, ELIOT L. SPITZER, New York State Attorney General, NATIONAL ASSOCIATION OF SECRETARIES OF STATE, "NASS", PETER KOSINSKI, individually and in his official capacity at the NASS, ALBERTO GONZALES, United States

Attorney General,

Defendants-Appellees,

JOSEPH BRUNO, SHELDON SILVER, LESLIE REYNOLDS, Executive Director for the Executive Committee, Defendants.**[1]

04-5720-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

144 Fed. Appx. 168; 2005 U.S. App. LEXIS 17480

August 15, 2005, Decided

NOTICE:

[*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: On remand at, Claim dismissed by Loeber v. Spargo, 2008 U.S. Dist. LEXIS 1416 (N.D.N.Y, Jan. 8, 2008)

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[1] ** The Clerk of this Court is instructed to alter the caption of this case as shown here to correct minor errors, conform to conventions, and reflect the replacement of John Ashcroft by Alberto Gonzales as United States Attorney General

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of New York (Kahn, J.). Loeber v. Spargo, 2004 U.S. Dist. LEXIS 21907 (N.D.N.Y. Oct. 29, 2004)

COUNSEL:

For Appellants: H. William Van Allen, Christopher Earl Strunk, Hurley, NY, Pro se.

For Appellee: Jennifer Grace Miller, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York, Daniel Smirlock, Deputy Solicitor General, on the brief), Albany, NY.

JUDGES: Present:
ROSEMARY S. POOLER,
SONIA SOTOMAYOR, Circuit Judges,
EDWARD R. KORMAN, Chief District Judge.*[12]

OPINION SUMMARY ORDER ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal be and it hereby is DISMISSED in part, the judgment of said District Court be and it hereby is VACATED in part and REMANDED, and

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[12] *The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

that the several motions of plaintiffs-appellants be and hereby are DENIED.

Plaintiffs-appellants H. William Van Allen [*2] and Christopher Earl Strunk appeal from an order of the district court dismissing sua sponte plaintiffs' claims regarding the conduct of the November 2004 national election and legislative redistricting. We assume the parties' familiarity with the facts, proceedings below, and specification of issues on appeal.

While not so specified, the dismissal of the election-based claims appears to have been pursuant to Federal Rule of Civil Procedure 12(b)(1) In the absence of any discussion by the district court, we presume that the redistricting claims were dismissed under Federal Rule of Civil Procedure 12(b)(6). We review dismissal under either Rule de novo, accepting all factual allegations of the complaint and drawing all inferences in favor of plaintiffs. *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 20 (2d Cir. 2004) (per curiam).

The appellants dispute the district court's conclusion that the claims based on the November 2004 election were not, at that time, ripe for review. We do not, and cannot, express any opinion on the correctness of this decision. Because we can [*3] no longer alter the conduct of the November 2004 election, and appellants requested only injunctive relief, these claims are

now moot and we are therefore without jurisdiction. See *Church of Scientology v. United States*, 506 U.S. 9, 12-13, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992)

Of course, an exception to the mootness doctrine exists where the claim is capable of repetition, yet evading review. *Lerman v. Board of Elections*, 232 F.3d 135, 141 (2d Cir. 2000). Here, the appellants election claims have obviously evaded review, but appellants have made no showing that the issue is capable of repetition. We therefore dismiss the appeal as to the election claims.

Turning to the redistricting claims, we note that the district court failed to present any discussion as to its decision to dismiss. Appellees suggest that the order of dismissal was predicated on the failure of the complaint to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint here, while prolix and burdensome both for the court and for appellees, can nonetheless be read and comprehended [*4] to plead at least some claims that are not frivolous on their face. We therefore vacate the district court's order as to the redistricting claims and remand with instructions to permit the filing of an amended complaint that omits unnecessary detail. Cf. *Salahuddin v. Cuomo*, 861 F.2d 40, 42-43 (2d Cir. 1988)

In reviewing any amended complaint, the district court should be mindful of our well-established

principle that pro se complaints are to be construed liberally. *Phillips v. Girdich*, 408 F.3d 124, 127-28 (2d Cir. 2005).

Furthermore, if a complaint satisfies the "short and plain statement" requirement, it otherwise need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506,512-13, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002)

The district court should also be mindful of the requirements of 28 U.S.C. §2284 and that its inquiry regarding whether to refer the matter to a three-judge panel is limited to 1) "whether the constitutional question raised is substantial"; 2) "whether the complaint at least formally alleges a basis for [*5] equitable relief"; and 3) "whether the case presented otherwise comes within the requirements of the three-judge statute." Id*lewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715, 8 L. Ed. 2d 794, 82 S. Ct. 1294 (1962). A constitutional question is insubstantial only if prior decisions render the issue inescapably frivolous and leave no room for any inference of controversy. *Goosby v. Osser*, 409 U.S. 512, 518, 35 L. Ed. 2d 36, 93 S. Ct. 854 (1973).

We have reviewed appellants' additional arguments concerning judicial bias and lack of notice of the October 2004 order to show cause hearing, and find them to be without merit.

Appellants have also made numerous motions before this court, all of which we deny. The motion to supplement the complaint should be made before the district court on remand, and we leave it to the district court to decide whether to permit such amendment. The motions to enjoin the New York Secretary of State to enforce civil rights law protection and to restrain persons elected to the state legislature from taking office are based on the November 2004 election and are now moot. The motion to remand to a three-judge panel is disposed of above by remanding [*6] to the district court for consideration of the requirements of Section 2284. The motion for en banc review is denied as it is not clear at this stage that the case implicates the uniformity of our precedent or is of exceptional importance. See Fed. R. App. P. 35(a).

For the above reasons, we dismiss the appeal as to the claims based on the conduct of the November 2004 election. We vacate the order of the district court as to the dismissal of the redistricting claims and remand for the district court to permit amendment of the complaint and for consideration of whether to refer the claims to a three-judge panel in accordance with 28 U.S.C. § 2284. We deny the motions filed in this Court on November 12, 2004, and July 1, 2005.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1 :04-Cv-1193 (LEK/RFT)

RONALD G. LOEBER, et al., Plaintiffs,

-against-

THOMAS J. SPARGO, individually and as Justice of the NYS Supreme Court, JOSEPH L. BRUNO, 61 JOHN and JANE DOE SENATORS, all individually and as state senators past and present; SHELDON SILVER, 149 JOHN and JANE DOE NYS ASSEMBLY MEMBERS, all individually and as past and present; And by service upon the Secretary of State: All New York State County Municipal Corporate Entities by each County Executive and The City of New York municipal corporation by its Mayor and THE NEW YORK STATE BOARD OF ELECTIONS, GEORGE E. PATAKI, individually and as NYS Governor; RANDY r: DANIELS, NYS Secretary of State with authority and depository for corporations and unincorporated associations service; per CPLR 1012 New York State Attorney General ELIOT SPITZER, THE NATIONAL ASSOCIATION OF SECRETARIES OU STATE ("NASS") with LESLIE REYNOLDS Executive Director for the Executive Committee, and PETER KOSINSKI, individually and his official capacity at the NASS, and per 28 USC 2403 The United States Attorney General JOHN ASHCROFT, Defendants.

Parties-in-interest.

DECISION AND ORDER

I. BACKGROUND

The plaintiffs, Individuals and the AD HOC New York State Citizens for Constitutional Legislative Redistricting organization ("Plaintiffs"), all acting pro se, ask this Court to issue an Injunction that would preclude the international organization, the Organization for Security and Co- Operation in Europe ("OSCE"), from carrying out its Election Observation Mission for the November 2, 2004 election in polling stations across New York State. The Plaintiffs contend that the presence of the OSCE's election observers within 100 feet of the New York polls would violate this state's Election Law.

II. DISCUSSION

Pursuant to Article III, § 2 of the Constitution, a federal court only has subject matter jurisdiction over an action if the dispute presents a case or controversy. See *Spencer v. Kcrnna*, 523 U.S. I7I. "Thus, jurisdiction exists only if the plaintiff has suffered, or been threatened with, an actual injury traceable to the defendant and likely to be redressed by a Favorable judicial decision." *Carpenter Tech. Corp. v. City of Bridgeport.*, 10 F.3d 93. 9S (2d Cir. 1999) (internal quotations and citations omitted).

(a) Lack of necessary parties

The preliminary injunction seeks an order that the OSCE's election observers be prohibited from entering New York's polling stations. However, the named defendants are not entrusted with administering the elections in this state. Rather, it is the County Boards of Elections one from each New York county. and the County Boards of Elections" Election Inspectors that arc empowered to supervise the local polling stations. Because these entities regulate admission into the individual polling stations, they will determine any issues relating to the entrance of OSCE's election observers.

Plaintiffs have failed to name the County Hoards or Elections or their Elections Inspectors as defendants. Instead, the Plaintiffs have named the New York State Board of Elections, which oversees the voting procedure, but docs not regulate individual polling stations. The Court cannot entertain the request of the instant complaint and preliminary injunction request because the actions complained of are not traceable to the named defendants. Thus, the Article III section 2 constitutional and jurisdictional requirement that there be a case or controversy is not met.

(b) The case is not ripe for adjudication

Even if the action had named all of the necessary parties, the action would still not be justiciable because it fails to meet the requirement that the claims be ripe for adjudication. The complaint and requested injunctive relief seek 10 enjoin public officials from permitting the entrance of OSCE's election observers into the rolling stations. However, no public officials in New York have issued any statements yet on whether the OSCE's election observers will be admitted to the polling stations or whether their presence and observation would comply with New York State Election Law. It is not known if the County Hoards of Elections or their Election Inspectors will involve the OSCE election observers on November 2 and whether such involvement or any will Violate the State Election Law.

The Court notes that personal jurisdiction also appears to be lacking because not all of the flamed defendants were served by Plaintiffs. Leslie Reynolds of NASS wrote to the Court on October 26, 2004, the day before the scheduled hearing. stating that she never received service in this action. She informed the Court that she learned (hat NASS was named in the action only based upon her reading of a press release distributed by the AD HOC New York State Citizens for Constitutional Legislative Redistricting.

Additionally, as cited by the Plaintiffs in their papers requesting the instant injunction, the OSCE's Election Observation Mission will be

carried out by the hundred election observers-twenty-five long-term observers and 75 short-term observers. Plaintiffs have not submitted evidence that any of" these individuals arc assigned to observe any of New York's polling stations.

Considering that, the Court docs not know how the New York Election Law will be applied to OSCE's election observers, nor has there been any evidence presented that they intend to observe New York's polling stations, there is not yet an actual or imminent injury to Plaintiff's are the claims presented by Plaintiffs are not ripe for adjudication by this Court. See 203 F.3d 162 (2d Cir.) (holding that (If federal court lacks jurisdiction to determine whether petition was filed timely where the petition has not yet been actually filed because there is no case or controversy).

(f) Sanctions

At tile hearing, the New York State Board or Elections asked the Court to impose sanctions on Plaintiffs because they have filed numerous suits, which the State Board of Elections characterized as frivolous. However, Plaintiffs action was brought based on a sincere concern tor our electoral process and sanctions are not violated.

III. CONCLUSION

The present action is not properly brought before this Court. The Court will not entertain the merits

of the action because Plaintiffs have not met the constitutional requirement that there be a "case" or "controversy" present. Plaintiffs allege violations of law that have not yet occurred and none of the allegations have yet ripened into a controversy. Further, the named defendants are not proper parties to this action and other necessary parties have not been joined. See *Corinth v. Ashcroft*, 74 Fed. App. 91, 92 (2d Cir. 2003) (affirming district Courts sua sponte with dismissal of the complaint "on the ground that a federal court lacks jurisdiction to consider constitutional challenges in the absence of an actual case or controversy") (unpublished).

Accordingly, it hereby is

ORDERED, that the case is DISMISSED is its entirety.

IT IS SO ORDERED.

DATED: October 29, 2004
Albany, New York

Lawrence E. Kahn
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

In the Matter of the reassignment of ORDER Civil Case to the Honorable Lawrence E. Kahn Of Reassignment

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ORDERED that the following case is hereby reassigned from the Honorable Gary L. Sharpe, U.S. District Judge to the Honorable Lawrence E. Kahn:

Case Number Caption 1:04-cv-1193 (RFT)

Loeber, et al. v. Spargo, et al.

The Motion Days for the Hon. Lawrence E. Kahn are as follows:

The first and third Friday of each month in Albany, New York at 9:30 a.m.

Any questions concerning case management should be directed to Scott A. Snyder, Courtroom Deputy Clerk, at (518) 257-1833.

IT IS SO ORDERED.

Dated: October 25, 2004
Syracuse, New York

Frederick J. Scullin, Jr.
Chief United States District Court Judge

NYSC Article III Section 4. [Readjustments and reapportionments; when federal census to control]

§4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.

The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed.

If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes.

The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session.

At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty.

Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county.

No town, except a town having more than a full ratio of apportionment, and no block in a city enclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district.

Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator.

No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public

waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts. (Amended by vote of the people November 6, 1945.)

NYSC Article III Section 5. [Apportionment of assemblymen; creation of assembly districts]

§5. The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member.

The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows:

> One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county.

containing less than the ratio and one-half over.

Two members shall be apportioned to every other county.

The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens.

Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively.

No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of *convenient and contiguous territory in as compact form as practicable*, each of which shall be wholly within a senate district formed under the same

apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six.

In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city enclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater

excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature. An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same. (Amended by vote of the people November 6, 1945.)

*The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations. *At present there are 150 assembly districts in accordance with Chapter 1002, Laws of 1983*